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# LEX SPORTIVA: THOUGHTS TOWARDS A CRIMINAL LAW OF COMPETITIVE CONTACT SPORT

CHRISTO LASSITER<sup>1</sup>

## INTRODUCTION

### *A. The Kimo von Oelhoffen Hit on Carson Palmer*

On January 8, 2006, in their first playoff game since 1991, the Cincinnati Bengals, American Football Conference North Division Champions, faced Division rivals, the Pittsburgh Steelers, a wild card team.<sup>2</sup> The Steelers had beaten the Bengals early in the season, but the Bengals resoundingly defeated the Steelers in a late season re-match.<sup>3</sup> Hopes were high that a Bengals victory over the Steelers would be the first playoff step to an American Football Conference Championship and then to victory in Super Bowl XL.<sup>4</sup> However, the Cincinnati Bengals'

<sup>1</sup> Thanks to the 2006 Oxford Roundtable on Criminal Law for many helpful suggestions. A much shorter version of this article was originally published in the Forum on Public Policy Online, Fall 2006 edition, which is the publishing arm of the Oxford Roundtable. The author is grateful for the fine editing work by the editorial staff of the St. John's Journal of Legal Commentary, especially Executive Articles Editor, Nicole Abruzzo. Thanks also to Charles Carter, research assistant, and to Louis Bilonis, Dean and Nippert Professor of Law at the University of Cincinnati College of Law for financial support. All opinions expressed are solely those of the author. Send comments to Christo.Lassiter@uc.edu.

<sup>2</sup> See ESPN.com, *Without Palmer, Bengals Struggle, Fall to Steelers*, <http://sports.espn.go.com/nfl/recap?gameId=260108004> (noting that "[t]he Steelers won their last four to get in as a wild card.") (last visited Feb. 20, 2007).

<sup>3</sup> The Steelers won twenty-seven (27) to thirteen (13) on October 23, 2005, but the Bengals were able to triumph over the Steelers thirty-eight (38) to thirty-one (31) on December 4, 2005. See ESPN.com, *Big Ben Returns in Steelers' 10th Straight Road Win*, <http://sports.espn.go.com/nfl/recap?gameId=251023004> (last visited Feb. 20, 2007); see also ESPN.com, *Palmer, Bengals Hand Reeling Steelers Third Straight Loss*, <http://sports.espn.go.com/nfl/recap?gameId=251023004> (last visited Feb. 20, 2007).

<sup>4</sup> Chad Johnson quipped, "It used to be Pittsburgh's time . . . Now it's Cincinnati's time." See Palmer, *supra* note 3. In 1967, the American Football League merged into the pre-existing National Football League [hereinafter NFL]. See ESPN.com, NFL History,

hopes realistically ended on the second play of the game after the opening kick off, when Pittsburgh Steeler defensive tackle Kimo von Oelhoffen viciously tackled Cincinnati Bengal quarterback Carson Palmer by bending his leg left against his knee joint, tearing the anterior cruciate and medial collateral ligaments in Palmer's left knee.<sup>5</sup> The Bengals managed a seventeen to seven (17 to 7) lead into the second quarter, but without Quarterback Palmer, the Steelers ultimately pulled ahead and won the game thirty-one to seventeen (31-17).<sup>6</sup> Palmer left the field on a stretcher, but no one cried foul.<sup>7</sup> Game officials, who may not have seen the hit, did not penalize von Oelhoffen during the game, nor did league officials fine von Oelhoffen after the game.<sup>8</sup> Cincinnati Bengal players, perhaps leery of sounding naive, did not levy complaints about von Oelhoffen, himself an ex-Bengal, and dirty play, at least not publicly, and at least not in the immediate aftermath of the game.<sup>9</sup>

<http://www.nfl.com/history/chronology/1921-1930> (last visited Feb. 20, 2007). The NFL re-organized into the American and National Football Conferences, which were further subdivided into divisions. *See id.* Division champions, plus the two non-division champion teams with the best records in each Conference, are invited to play in a single elimination tournament. *See id.* The NFL Championship game between the winners of the National Football Conference and the American Football Conference is popularly known as the Super Bowl. *See id.* The Bengals had previously competed in Super Bowl XVI in 1982, suffering a twenty-six to twenty-one (26-21) loss to the San Francisco 49ers; in Super Bowl XXIII in 1989 they again lost twenty to sixteen (20-16) to the San Francisco 49ers. SuperBowl.com, Super Bowl Recaps, <http://www.superbowl.com/history/recaps> (last visited Feb. 20, 2007).

<sup>5</sup> *See The Hit: Bengals QB Palmer Vows Return; Doctor Says Injury 'Complicated'*, CINCINNATI ENQUIRER, Jan. 10, 2006, at 1A.

<sup>6</sup> *See id.* Palmer endured reconstructive knee surgery and rehabilitation of his left knee in time for the start of the 2006 Football Season. *See* Mark Curnette, *Palmer Plans to Face Packers*, CINCINNATI ENQUIRER, Aug. 21, 2006, at 1C. Perseverance paid off as the Bengals beat the Steelers in their first regular season re-match on the Steelers' home turf twenty-eight to twenty (28-20) to share the lead for first place in the American Football Conference, and leaving the Steelers second to last in the AFC North Division after Week 5 of the NFL 2006 Season. *See* ESPN.com, NFL Standings - 2006, [www.espn.go.com/nfl/standings](http://www.espn.go.com/nfl/standings) (last visited Feb. 20, 2007).

<sup>7</sup> "Even though [von Oelhoffen] wasn't flagged, the NFL can still fine [him]." Geoff Hobson, *A Hit That Ends a Season and Haunts the Next*, [http://www.bengals.com/news.asp?story\\_id=5004](http://www.bengals.com/news.asp?story_id=5004) (last visited Feb. 20, 2007).

<sup>8</sup> According to Dave Lapham, long-time Bengals radio analyst, "[Y]ou at least throw a penalty flag on it. If you take more than one step toward and hit him below the waist, it's supposed to be a penalty." *See* Hobson, *supra* note 7.

<sup>9</sup> Although Bengals players did not levy complaints publicly, they were "not pleased with Steelers defensive end Kimo von Oelhoffen after he dove into the side of Carson Palmer's left knee." *See* Hobson, *supra* note 7. Carson Palmer expressed hatred for the Pittsburgh Steelers, but still no animosity for any individual player. *See* Michael Silver, *The Rehabilitation of Carson Palmer*, SPORTS ILLUSTRATED, May 29, 2006, at 58.

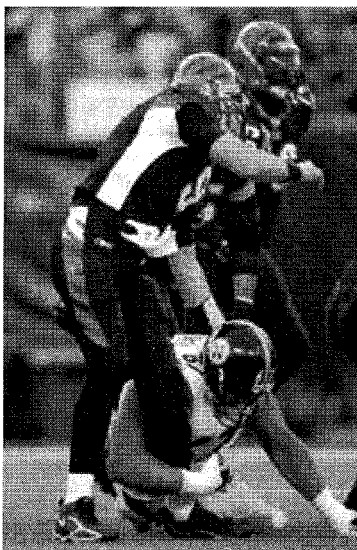
The nature of the hold and leverage exerted by von Oelhoffen on Palmer's knee not only ended the quarterbacks' effort for the game, but could very well have ended his career. Fortunately, Palmer, who underwent very successful surgery, worked relentlessly to speedily rehabilitate his left knee.<sup>10</sup> In Week Three of the following year 2006, a twenty-eight to twenty (28-20) win over the Pittsburgh Steelers, Quarterback Carson Palmer threw four touchdown passes.<sup>11</sup> For their part, the unrepentant Steelers maintained their smash mouth brand of football. Pittsburgh Steeler safety Ryan Clark delivered the hardest hit in the game, a flying shoulder pad tackle to the stomach of Cincinnati Bengal wide receiver Chris Henry, which momentarily stunned the player and halted play.<sup>12</sup> Speaking to the press afterwards, Ryan Clark all but admitted that the hit was intended to do more than merely break-up the pass on the specific play. He stated, "[o]ne thing about us, we are going to run around and try to hit. When you play an offense that is good like (the Bengals), the best thing you can do is be physical."<sup>13</sup> Football is a physical game and playing the game aggressively is necessary to stop an opponent from being successful; the greater an opponent's skill, the more defined the hits must be (the bigger they are, the harder they fall). And it is certainly an acceptable strategy to deliver blows designed to challenge an opponent's will to win. But somewhere in this escalation, a line may be crossed. Though football is contested by violent confrontation, it simply cannot be absolutely legal to violently attack opponents with the intention to cause grievous bodily injury or death. Should von Oelhoffen's hit on Palmer be regarded as an act of criminal violence? The best start to answering this question is to review a photograph of the attack as it occurred.

<sup>10</sup> Palmer credited his dedicated rehabilitation efforts to his goal of playing in Cincinnati's 2006 season opener. See Silver, *supra* note 9, at 58.

<sup>11</sup> Palmer's four touchdown passes led the Bengals to victory. See NFL.com, *Palmer, Bengals Get Revenge vs. Steelers*, [http://www.nfl.com/gamecenter/recap/NFL\\_20060924\\_CIN@PIT](http://www.nfl.com/gamecenter/recap/NFL_20060924_CIN@PIT) (last visited Feb. 20, 2007).

<sup>12</sup> Henry took the "frightening shot" at Clark, "drill[ing] him with his shoulder." See Geoff Hobson, *Palmer, Offense Find a Way*, [http://www.bengals.com/news/news.asp?story\\_id=5527](http://www.bengals.com/news/news.asp?story_id=5527) (last visited Feb. 20, 2007).

<sup>13</sup> Mark Curnutte, *Rivalry-and Antics-as Expected: Talk, Penalties, Hits: You Name It, Game Had It*, CINCINNATI ENQUIRER, Sept. 26, 2006, at B-1.



Andy Lyons/Getty Images

The photograph shows that as von Oelhoffen dislocated Palmer's knee, the ball had already left Palmer's hand and that he stood completing his follow through. This is one of the most vulnerable poses in football.<sup>14</sup> The NFL has long penalized 300 pound defensive lineman who come barreling into level a quarterback in this position, especially where the tackler leads with his helmet.<sup>15</sup> However, football exuberance does not a criminal make. The photograph does not show von Oelhoffen barreling in. The photograph shows that von Oelhoffen was not pushed nor did he fall out of control onto Palmer. The photograph entirely refutes the hypothesis of accident, out-of-control athletic exuberance or even misadventure. Instead, the photograph quite clearly shows von Oelhoffen in control and forcing Palmer's left knee to bend sideways against the joint tearing the anterior cruciate and medical collateral ligaments in

<sup>14</sup> Earlier in the 2005 season, Pittsburgh Quarterback Ben Roethlisberger suffered a hyper-extended left knee when San Diego Chargers defensive end Luis Castillo hit him in Week Five. See Mark Curnutte, *Roethlisberger-Palmer Shootout Next Week*, CINCINNATI ENQUIRER, Oct. 16, 2006, at C11.

<sup>15</sup> When a player tackles another player with his helmet, he receives a penalty for "spearing" and the team loses fifteen yards. See Football Penalties, <http://library.thinkquest.org/6386/penalty.htm> (last visited Feb. 20, 2007).

Palmer's left knee. At the level of expertise necessary to become a professional athlete, von Oelhoffen's action in bending Palmer's knee out of joint may realistically be characterized as it appears in the photograph, namely a knowing act, or more likely, a purposeful act, causing grievous bodily injury. Football is a contest of violent confrontations, but it simply cannot remain legal to execute tactics, that purposely or knowingly risk grievous bodily injury regardless of the legitimacy of the sporting objective. The question is at what point, if any, does a controlled, purposeful or knowing attack occurring during a competitive contact sports contest cross the line to sanctionable criminal misconduct?

*B. What, if Anything is Criminal in Competitive Contact Sports?*

One of the most important facets of success in competitive contact sports such as football is the necessity to break an opponent's will to win. The will to win may be broken with hard physical contact. A hard hit may break the will to win momentarily, a harder hit may break the will to win for a longer moment, the hardest hit may break the will to win for the season, perhaps for a career. At what point does deliberate grievous bodily injury transcend sports to become criminal? Should the criminal law impose limits to defeating an opponent in competitive play? It would seem undeniable that the promotion of legitimate vigorous competitive contact sport is a worthy goal that should brook no interference from the criminal law. It is equally certain, however, that purposeful or knowing criminal objectives carried substantially to fruition should be punished in criminal law. This is thuggery masquerading as criminal sport.

Game penalties, including loss of yards, downs or even player ejection, as assessed by game officials, combined with fines levied by league officials, provide adequate disincentives for unsportsmanlike conduct, but not for criminal misconduct. The concern here is to address criminal thuggery masquerading as sport under the high speed, violent competitive nature of a contact sport. Purposely or knowingly causing grievous bodily injury or death before, during, and after games as well as play-interrupting brawls and post game melees are not adequately

addressed by game penalties or league fines, precisely because they are beyond the scope of the game. Purposefully or knowingly causing grievous bodily injury as well as play interrupting brawls and post game melees would be viewed as criminal conduct in any context except competitive contact sports. Such thuggery does not, and can not be permitted to, serve a legitimate objective in competitive contact sports.

i. Assaults: Competition Motivated Attacks Prior to Competitive Contact Sports Play

The best way to begin the analysis in determining the point at which a controlled purposeful or knowing attack crosses the line to criminal misconduct is with the most dramatic competitively motivated criminal attack in recent memory, namely the clubbing of U.S. Figure Skater Nancy Kerrigan's knee at the 1994 U.S. Olympic Trials.<sup>16</sup> Kerrigan was the reigning U.S. Figure Skating Association [hereinafter USFSA] Champion and a favorite to win gold at the 1994 Winter Olympics.<sup>17</sup> Jeff Gillooly, the ex-husband of U.S. Figure Skater Tonya Harding, Kerrigan's chief American rival, and his henchmen<sup>18</sup> admitted to the attack.<sup>19</sup> Physically unable to perform due to her injured knee, Kerrigan withdrew from the U.S. Olympic trials, but was later added to the team anyway.<sup>20</sup> At the 1994 Winter Olympics, Kerrigan won the silver medal;

<sup>16</sup> See Christine Brennan, *Skater Attacked at Olympic Trials*, WASH. POST, Jan. 7, 1994, at A1 (stating that Kerrigan "was attacked by a man wielding a blunt object after a practice this afternoon at the U.S. Olympic trials.").

<sup>17</sup> See Brennan, *supra* note 16, at A1.

<sup>18</sup> The henchmen include Shawn Eckardt, Derrick Smith, and Shane Stant, all three of whom received an eighteen-month sentence by the Multnomah County Court. See Robert Facht, *Gillooly Gets Two Years in Prison, \$100,000 Fine*, WASH. POST, Jul. 14, 1994, at D2. Shane Stant was the actual clubber, Derrick Smith drove the getaway car, and bodyguard Shawn Eckardt planned the attack. See Johnette Howard, *Harding Admits Guilt in Plea Bargain, Avoids Prison*, WASH. POST, Mar. 17, 1994, at A1 [hereinafter *Harding Admits Guilt in Plea Bargain*].

<sup>19</sup> Jeff Gillooly pled guilty to one count of racketeering in connection with the plot before a Portland, Oregon circuit court judge sitting in Multnomah County, Oregon and received a two year sentence and a \$100,000 fine. See Stephen Buckley, *Gillooly Pleads Guilty, Says Harding Approved Plot*, WASH. POST, Feb. 2, 1994, at A1; see also Facht, *supra* note 18, at D2.

<sup>20</sup> The USFSA is the non-governmental body which selects figure skaters to represent the United States on behalf of the United States Olympic Committee. See Christine Brennan, *Kerrigan Picked to Join Harding for Olympics*, WASHINGTON POST, Jan. 9, 1994, at D1. USFSA rules allow the USFSA to select athletes who did not compete at qualifying trials. See *id.*

Harding placed eighth.<sup>21</sup> Harding admitted that she was aware of the plot after it occurred,<sup>22</sup> but the USFSA lacked administrative authority to exclude Harding from competing in the Olympics without a hearing to determine guilt.<sup>23</sup> Months later, the USFSA conducted a hearing and concluded based upon circumstantial evidence that Harding knew of the plot before it occurred and stripped Harding of her title and banned her from USOC sanctioned events for life.<sup>24</sup> Tonya Harding ultimately pled guilty to obstructing the grand jury investigation into the attack.<sup>25</sup>

In the football analog to the Kerrigan hit, on September 13, 2006, local police in Evan, Colorado arrested Mitch Cozad, a back-up punter for the University of Northern Colorado for allegedly stabbing starting punter, Rafael Mendoza, in the leg as Mendoza was exiting his car on the evening of September 11, 2006.<sup>26</sup> Police assigned competition for the starting punting job

<sup>21</sup> "Kerrigan made a strong argument for the gold." See Christine Brennan, *For Kerrigan, All That Glitters is Silver*, WASH. POST, Feb. 26, 1994, at A1.

<sup>22</sup> See Johnette Howard, *Harding Admits Knowing of Plot After the Attack*, WASH. POST, Jan. 28, 1994, at A1 (noting "Tonya Harding admitted today that she learned about the plot to disable skating rival Nancy Kerrigan within a week after the Jan. 6 attack.").

<sup>23</sup> The United States Olympic Committee [hereinafter USOC] had no mechanism to bar Tonya Harding from competing in the Olympics because of procedural guarantees available in the United States Olympic and Amateur Sports Act. Christine Brennan, *Group Begins Disciplinary Action Against Harding*, WASH. POST, Feb. 6, 1994, at A1; see Serge Kovalski, *Harding Files \$20M Lawsuit Against the USOC*, WASH. POST, Feb. 10, 1994, at D1; see also Christine Brennan, *Deal Puts Harding in Olympics as Games Begin*, WASH. POST, Feb. 13, 1994, at A1.

<sup>24</sup> Robert Weaver, Harding's attorney stated that Harding categorically denied allegations by her ex-husband and others and further denied Harding had prior knowledge or participated in the attack on Nancy Kerrigan. See Christine Brennan, *Harding Stripped of Title; Banned for Life*, WASH. POST, July 1, 1994, at C1. Weaver stated that Harding was disappointed, but not surprised that the USFSA found her guilty because she did not appear to defend herself. See *id.*

<sup>25</sup> Harding's plea agreement required her to withdraw from the American team scheduled to compete at the 1994 figure skating world championships in Japan and resign from the U.S. Figure Skating Association. In addition, Tonya Harding agreed to pay a \$100,000 fine (the maximum then allowed under Oregon sentencing guidelines), set up a \$50,000 fund to benefit Special Olympics, reimburse Multnomah County prosecutors \$10,000 in costs, perform 500 hours of unspecified community service, and undergo psychiatric examination and participate in any treatment ordered by the court. See *Harding Admits Guilt in Plea Bargain*, *supra* note 18, at A1.

<sup>26</sup> See Pat Graham, *Backup Punter May Have Stabbed Starter*, WASH. POST, Sept. 14, 2006, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/09/13/AR2006091301293.html>. Based on his arrest, the University of Northern Colorado immediately dismissed Cozad from the team, the University, and on-campus housing. See *id.*



as motive for the stabbing.<sup>27</sup> On October 19, 2006, Weld County, Colorado District Attorney's office filed an attempted first degree murder charge and one count of second degree assault against Cozad.<sup>28</sup>

Though criminal intent is more readily acceptable in competitor motivated attacks occurring out of play, demonstrable criminal, purposeful, or knowing acts should make criminal attacks occurring during play or disrupting equally out of bounds. If a competitively motivated, intentional attack on a fellow competitor's knee out of play clearly crosses the line to criminal misconduct, it should be equally clear that a competitively motivated purposely or knowing attack on a fellow competitor's knee during play should also cross the line of criminality. Competition motivated attacks are always out of bounds and where a purposeful or knowing state of mind is established beyond a reasonable doubt, criminality should not turn on whether the attack is masked by darkness of a parking lot or the brightness of stadium lights. Given high stakes competition, it is inevitable that at some point in competitive contact sports, there are risks or intentional acts that will necessarily cross the line from mere unsportsmanlike conduct to criminal liability. And, if it is inevitable that there is a point where a controlled, purposeful or knowing attack in competitive contact sports crosses the line to criminal misconduct, our next step is to consider athletic scenarios where purposeful or knowing attacks are seemingly in play.

## ii. Attackles: Competition Motivated Attacks During Competitive Contact Sports Play

In addition to off-the-field attacks like the Tonya Harding hit on Nancy Kerrigan, three additional instances of obvious thuggery come readily mind as going beyond the pale of mere bad sportsmanship to cross the line to potential criminal misconduct. First there is acting with purposeful or knowing intent to cause

<sup>27</sup> See Kelly Lyell, *Football Roundup: Competition May Be Motive in Stabbing of Northern Colorado Punter*, TUCSON CITIZEN, Sept. 14, 2006, available at <http://www.tucsoncitizen.com/altss/printstory/college/26154>.

<sup>28</sup> See Pat Graham, *Punter Faces Attempted Murder Charge*, Oct. 20, 2006, [http://www.boston.com/sports/colleges/football/articles/2006/10/20/punter\\_faces\\_attempted\\_murder\\_charge/](http://www.boston.com/sports/colleges/football/articles/2006/10/20/punter_faces_attempted_murder_charge/). If convicted, Cozad could face up to forty-eight years in prison. See *id.*

grievous bodily injury or death occurring during, but grossly exceeding the limits of fair play. Second there is acting with purposeful or knowing intent to aggravate a pre-existing injury to debilitate an athlete completely and perhaps permanently, again occurring during, but grossly exceeding the limits of fair play. Third, and finally there is acting with purposeful or knowing intent to cause grievous bodily injury or death outside the field of play or interrupting play. In cases such as these a *mens rea*, i.e. an intent to cause grievous bodily harm or death can be made out on the facts, and is clearly distinguishable from aggressive competition, and that being the case there is really no good reason to permit the victimization of athletes merely because the attack occurs in competitive contact sports.

a. Purposely or Knowing Intending to Cause Grievous Bodily Injury During Competitive Play

Attacks possibly purposefully or knowingly intending to cause grievous bodily harm may be best exemplified by the play of former Oakland Raider safety Jack Tatum. In the folklore of the National Football League, Tatum is widely regarded as a fierce competitor and the hardest hitting safety of all time.<sup>29</sup> In one of the most celebrated images from Super Bowl XI in 1977, Tatum hit Minnesota Vikings' wide receiver Sammy White so hard that White's helmet came off.<sup>30</sup> The most infamous example of Tatum's hitting ability was his hit on New England Patriots wide receiver Darryl Stingley as he was leaping for a pass leaving his body entirely exposed, in a single-minded attempt to catch an overthrown ball. The ball had already left his fingertips at the time Tatum slammed into him leading with his helmet. The hit badly damaged Stingley's spinal cord and left him paralyzed from the chest down.<sup>31</sup> Although the rules were later changed, at the time, the hit was legal under NFL rules.<sup>32</sup> There

<sup>29</sup> See Wikipedia.org, [http://en.wikipedia.org/wiki/Jack\\_Tatum](http://en.wikipedia.org/wiki/Jack_Tatum). Tatum is popularly known as the "Assassin." *Id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* Tatum claims that he attempted to visit Stingley in the hospital soon after the hit but was forbidden by Stingley's family. See *id.* The two have not spoken since that day. See *id.*

<sup>32</sup> See Eric Dexheimer, *He Shoots, He Sues*, July 8, 2004, <http://www.westword.com/2004-07-08/news/he-shoots-he-sues/1>.

was no penalty, no fine, no prosecution, criminal or civil, and no apology from Tatum.<sup>33</sup> Instead, Tatum boasted: "I like to believe that my best hits border on felonious assault."<sup>34</sup> Tatum remains a celebrated and honored athlete.<sup>35</sup> Tatum played college ball at The Ohio State University where current head coach Jim Tressel, instituted the "Jack Tatum Hit of the Week Award."<sup>36</sup> In light of Tatum's self-professed belief that he "like[s] to believe that [his] best hits bordered on felonious assault," perhaps a better remembrance of Jack Tatum is to coin hard hitting tackles like his that purposely or knowingly cause grievous bodily harm "attackles."<sup>37</sup> This new term combines the words attack and tackle to call attention to hits occurring in the context of competitive contact sports play which border on felonious assault, and indeed, may very well cross the line of criminality.

A most recent hit worthy of consideration as an "attackle" occurred on October 1, 2006 in a National Football League game. Early in the third quarter, just after a five yard touchdown run by Dallas' Julius Jones in the Cowboys forty-five to fourteen (45-14) victory, Tennessee Titan defensive lineman, Albert Haynesworth kicked off the helmet of Dallas offensive lineman Andre Gurode and then stomped and scraped his cleats across Gurode's face and forehead. Gurode required thirty stitches and missed the next two games.<sup>38</sup> Game officials immediately called a personal foul for flagrant unnecessary roughness against Haynesworth. When he saw the penalty flag, Haynesworth took off his helmet and tossed it, drawing a second personal foul and ejection—for the unsportsmanlike protest, not for stomping on an opponent's face.<sup>39</sup>

<sup>33</sup> See *id.* Tatum has never apologized for the hit. He has stated, "I don't think I did anything wrong that I need to apologize for. It was a clean hit." Wikipedia.org, [http://en.wikipedia.org/wiki/Jack\\_Tatum](http://en.wikipedia.org/wiki/Jack_Tatum).

<sup>34</sup> Notable-Quotes.com, [http://www.notable-quotes.com/t/tatum\\_jack.html](http://www.notable-quotes.com/t/tatum_jack.html).

<sup>35</sup> Jack Tatum was a 2005 inductee into the College Hall of Fame and in a 2006 Sports Illustrated poll to name the best defensive back of all time, he garnered eight percent of the vote. He wrote three best-selling books: *They Call Me Assassin* (1980), *They Still Call Me Assassin* (1989), and *Final Confessions of NFL Assassin Jack Tatum* (1996). See Wikipedia.org, [http://en.wikipedia.org/wiki/Jack\\_Tatum](http://en.wikipedia.org/wiki/Jack_Tatum).

<sup>36</sup> Wikipedia.org, [http://en.wikipedia.org/wiki/Jack\\_Tatum](http://en.wikipedia.org/wiki/Jack_Tatum).

<sup>37</sup> *Id.*

<sup>38</sup> See Tom Weir, *Titans' Haynesworth Suspended Five Games for Stomping Incident*, Oct. 2, 2006, [http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension\\_x.htm](http://www.usatoday.com/sports/football/nfl/titans/2006-10-02-haynesworth-suspension_x.htm).

<sup>39</sup> See *id.*

After the game, Haynesworth appeared contrite and remorseful.<sup>40</sup> League officials suspended Haynesworth for five games for the face stomping incident, the longest by the NFL for on-field actions.<sup>41</sup> The five game suspension will cost Haynesworth \$190,000 of his \$646,251 annual salary in forfeited salary, and possibly a portion of signing bonuses.<sup>42</sup> Nashville's Metro Police Department and the Davidson County District Attorney's office issued a joint statement saying they were "ready to assist Gurode in criminally prosecuting Haynesworth if Gurode so chooses," but Gurode did not so choose.<sup>43</sup> Kicking off a helmet and stomping on the head of another with a cleated foot goes beyond poor sportsmanship; it is a matter of public interest and requires public vindication regardless of the personal code or perhaps personal financial motive of the victim not to press charges.

The stomping, shown repeatedly in television replays, brought nearly unanimous condemnation.<sup>44</sup> These actions go beyond unsportsmanlike conduct and cannot possibly be considered an inherent risk of playing football. There should be no question that such thuggery masquerading as legitimate competitive sport should be subject to criminal sanction in law regardless of whether the attack occurs on or off the field of play. If competition motivated criminal attacks occurring out of play are the proper domain of the criminal sanction, then so too must

<sup>40</sup> Haynesworth called his actions "disgusting" and said he would accept whatever penalty the NFL issued. *Id.* Albert Haynesworth has an extensive history of violence including a road rage incident (May 2006), kicking a teammate in the chest during practice (2003), and fighting with two teammates (2002). See *Titans Lineman Haynesworth Cleared of Charges Again*, June 15, 2006, <http://cbs.sportsline.com/nfl/story/9508496>; see also CBC Sports Online, <http://www.cbc.ca/sports/football/story/2006/10/02/nfl-titans-haynesworth.html>.

<sup>41</sup> See *Haynesworth Suspended for Unprecedented Five Games*, Oct. 3, 2006, <http://sports.espn.go.com/nfl/news/story?id=2610577>. Previously, the longest suspension for on-field behavior was two games for Green Bay defensive lineman Charles Martin for throwing Chicago quarterback Jim Mahon to the ground during a game on November 23, 1986. *Id.*

<sup>42</sup> See Weir, *supra* note 40. The Haynesworth suspension is the first NFL suspension of a player since Rodney Harrison, then with San Diego, received a one game suspension for hitting Oakland's Jerry Rice with his helmet. Earlier that season, Denver's Kenoy Kennedy also received a one game suspension for a helmet-to-helmet hit on Chris Chambers of Miami. See NFL.com, <http://www.nfl.com/teams/story/TEN/9700907>.

<sup>43</sup> See Weir, *supra* note 40.

<sup>44</sup> See Wikipedia.org, [http://en.wikipedia.org/wiki/Albert\\_Haynesworth](http://en.wikipedia.org/wiki/Albert_Haynesworth) (quoting NFL Commissioner Roger Goodell as saying that there was "absolutely no place in the game, or anywhere else for Haynesworth's behavior.") (internal quotations omitted).

criminal intent be more readily acceptable conceptually in competitor motivated attacks occurring out of play. Demonstrable criminal intent should make criminal attacks during the field of play out of bounds the same as off-field attacks.

In ice hockey, players may seek to inflict grievous bodily harm by "slashing" an opponent with a hockey stick. A good indication that the slash is deliberate is when the slasher has both hands on the stick (signifying control and added strength) and usually attacks an opponent about the head or face or ankle since most of the rest of the body is padded during play. Slashing is a penalty called when an offending player swings his hockey stick at an opposing player, regardless of contact. The penalty may range from a minor penalty to a match penalty, depending on the injury to the opposing player. The National Hockey League provides two modern precedents for successful application of the criminal sanction for acts disrupting competitive sporting play or occurring immediately at the conclusion of legitimate sports play. Vancouver authorities convicted Boston Bruin player Marty McSorley of assault with a weapon for slashing Vancouver's Donald Brashear in the head with his stick on February 21, 2000.<sup>45</sup> New York Islanders ice hockey player Todd Bertuzzi pleaded guilty to causing bodily harm and missed twenty games for a blind side punch that left Colorado forward Steve Moore with broken bones in his neck on March 8, 2004.<sup>46</sup>

A most recent example of hockey slashing occurred March 8, 2007 when New York Islander "enforcer" Chris Simon slashed New York Ranger forward Ryan Hollweg with a vicious two-handed stick swing to the face. The attack occurred on the three year anniversary of Bertuzzi's blind side punch of Moore. The

<sup>45</sup> The National Hockey League suspended McSorley for the final 23 games of the 2000 season. NHL Commissioner Gary Bettman extended the ban until February 2001 and McSorley never played in the NHL again. At the time of his suspension, McSorley was the fourth most penalized player in the league with 3,381 penalty minutes. See Wikipedia.org, [http://en.wikipedia.org/wiki/Marty\\_McSorley](http://en.wikipedia.org/wiki/Marty_McSorley); *Simon suspended for hitting player with stick*, <http://sports.espn.go.com/nhl/news/story?id=2792516>.

<sup>46</sup> Bertuzzi missed the final 13 regular season games and the playoffs in 2004. The NHL extended the banishment to 17 months and prevented him from playing anywhere during the yearlong NHL lockout in the 2005-06 season. See Wikipedia.org, [http://en.wikipedia.org/wiki/Todd\\_Bertuzzi](http://en.wikipedia.org/wiki/Todd_Bertuzzi); *Simon suspended for hitting player with stick*, <http://sports.espn.go.com/nhl/news/story?id=2792516>.

attack was retaliation for Hollweg driving Simon into the boards, a clean and legitimate maneuver. Simon got up angrily and met Simon as they came together again, connecting with a swinging motion near Hollweg's chin and neck. Hollweg fell to his back and rolled over to his stomach by the boards. He was motionless for a few minutes and was bleeding from the chin when he got up. Despite the horrendous appearance of the attack, Hollweg only required a few stitches. Simon's act warranted a match penalty for a deliberate attempt to injure. Match officials ejected Simon with 6:31 remaining in a tie game. The ensuing power play resulted in Petr Perucha's decisive goal in the New York Ranger's win.<sup>47</sup> The NHL suspended Simon a league record 25 games.<sup>48</sup> However, when Hollweg declined to press charges, Nassau County, (New York) prosecutors ultimately decided against criminal prosecution as well.<sup>49</sup> In a public statement and apology, Simon indicated that he had met with the team's medical staff who examined him as well as studied tape of the incidents, in particular his face and was told that he suffered a concussion after being hit into the boards.<sup>50</sup> Simon's possible defense of provocation, automatism, as well as the lack of serious injury and his apparent remorse may have played as much a role in non-prosecution as Hollweg's decision not to press charges.

#### b. Purposely or Knowingly Aggravating a Pre-existing Injury

An example exemplifying intentional aggravation of a pre-existing injury occurred in the 1972 international hockey match between the Soviet Union and Canada. Canadian star Bobby Clarke delivered a two handed slash to Valeri Kharlamov's sore ankle, fracturing the Soviet star's ankle. Kharlamov was never

<sup>47</sup> *Simon suspended for hitting player with stick*, <http://sports.espn.go.com/nhl/news/story?id=2792516>. Simon has been suspended four other times for violent on-ice acts and received a three-game ban in 1997 after directing a racial slur toward player Mike Grier, who is black. *Id.*

<sup>48</sup> Kevin Allen, *Isle's Simon suspended for rest of season*, USA TODAY, Mar. 10, 2007, <http://asp.usatoday.com/community/tags/topic.aspx?req=tag&tag=Ryan%20Hollweg>.

<sup>49</sup> *See Rangers' Hollweg won't press charges vs. Simon*, USA TODAY, March 15, 2007; *No charges will be filed in Simon stick-swinging incident*, USA TODAY, Mar. 18, 2007, <http://asp.usatoday.com/community/tags/topic.aspx?req=tag&tag=Ryan%20Hollweg>.

<sup>50</sup> *Simon's Statement*, Mar. 11, 2007, <http://www.islanderarmy.com/blog/category/chris-simon/>.

able to return to form during the series.<sup>51</sup> Prior to the match there was substantial media coverage given Kharlamov's sore ankle. Therefore Clarke knew full well that a two handed slash to Kharlamov's ankle would cause debilitation. After the series, Kharlamov reflected thusly:

I am convinced that Bobby Clarke was given the job of taking me out of the game. Sometimes I thought it was his only goal. I looked into his angry eyes, I saw his stick which he wielded like a sword, and didn't understand what he was doing. I had nothing to do with hockey.<sup>52</sup>

After the attack, the Canadians rallied for a series victory. Many in the Canadian press lauded the act of violence as "an act of heroism," but "[t]he attack also cemented Canadian hockey players' reputation as thugs who won games through intimidation and violence rather than skill and finesse."<sup>53</sup> Specifically attacking a pre-existing injury to debilitate is not sport and is more properly considered criminally.

### iii. Play Disruptive Fights

In addition to acts intended to cause grievous bodily harm or death, the third area that readily suggests the need for criminal sanctions is play interrupting brawls or post game melees. On Saturday, October 15, 2006, established college football power, the University of Miami Hurricanes, played little known cross town rivals, the Florida International University Golden Panthers. Miami's James Bryant caught a five-yard touchdown pass with about nine minutes left in the third quarter to give the Hurricanes a thirteen to zero (13-0) lead.<sup>54</sup> He pointed at the FIU bench and bowed to the crowd, incurring a fifteen-yard penalty for taunting. On the extra point that made it fourteen to zero (14-0), FIU's Chris Smith knocked down holder Matt Perelli and appeared to punch him.<sup>55</sup> More than 100

<sup>51</sup> See CBC Sports Online, [http://www.cbc.ca/sports/columns/top10/hockey\\_lowlights.html#4](http://www.cbc.ca/sports/columns/top10/hockey_lowlights.html#4) (listing series of violent acts in hockey games).

<sup>52</sup> 1972 Summit Series: A September to Remember, <http://www.1972summitseries.com/kharlamov.html>.

<sup>53</sup> See *id.*

<sup>54</sup> See Wikipedia.org, [http://en.wikipedia.org/wiki/Miami-FIU\\_brawl](http://en.wikipedia.org/wiki/Miami-FIU_brawl).

<sup>55</sup> See *id.*

players from both teams joined the fracas that immediately ensued.<sup>56</sup> Video replay shows Miami safety Anthony Reddick raced off the side lines with his helmet held high and swinging it like a weapon against the back of an FIU player.<sup>57</sup> Numerous Miami players are seen stomping on FIU players while they were on the ground. The video also shows an injured FIU player on crutches hobbling off the opposing side line and swinging his crutch like a weapon.<sup>58</sup> Miami police were required to restore order, but there were no arrests and none are intended.<sup>59</sup> The Miami-FIU brawl was the second of that day as earlier, an on-field fight between football teams representing Dartmouth and Holy Cross fought after Holy Cross players celebrated an overtime victory by stomping of the Dartmouth "D" logo conveniently set at midfield.<sup>60</sup>

The culture of American football is such that not only are arrests not made for such on-field melees, there is a strong undercurrent of support for such passion, even if deplored officially or publically. Lamar Thomas, an announcer with Comcast Sports SouthEast, watched as the Miami-FIU brawl raged out of control and stated on the air:

Now, that's what I'm talking about. . . . You come into our house, you should get your behind kicked. You don't come into the OB [Orange Bowl] playing that stuff . . . You can't come over to our place talking noise like that. You'll get

<sup>56</sup> See Erik Brady and Dick Patrick, *With Brawl in National Headlines, Miami's Reputation Takes Step Backward*, USA TODAY, Oct. 17, 2006, [http://www.usatoday.com/sports/college/football/acc/2006-10-16-miami-cover\\_x.htm](http://www.usatoday.com/sports/college/football/acc/2006-10-16-miami-cover_x.htm) (stating that it was most watched video on youtube.com that Monday).

<sup>57</sup> See *id.* (stating that University of Miami and Athletic Conference Commissioners suspended him indefinitely and stated that additional disciplinary measures will be taken to include community service and other action).

<sup>58</sup> See *id.* (quoting that "Florida International dismissed Chris Smith and Marshall McDuffie Jr. from the team and suspended 16 others indefinitely" and that the University also required "[a]ll 18 [players] to complete 10 hours of anger management counseling and fulfill 50 hours of community service intended to educate South Florida youth on appropriate behavior at athletic competitions.") (internal quotations omitted).

<sup>59</sup> See *id.* (quoting Miami police lieutenant Bill Schwartz as saying that "while some arrests were made in the stands, the department was not contemplating charges against players.").

<sup>60</sup> See Austin Murphy, *In the Bag: OSU's Smith May Have Already Locked Up the Heisman*, SI.COM, Oct. 19, 2006, [http://sportsillustrated.cnn.com/2006/writers/austin\\_murphy/10/19/murphys.law/index.html](http://sportsillustrated.cnn.com/2006/writers/austin_murphy/10/19/murphys.law/index.html) (describing other fight that day between Holy Cross and Dartmouth football teams).



your butt beat. I was about to go down the elevator to get in that thing.<sup>61</sup>

As the fight slowed, Thomas' comments continued, "I say, why don't they just meet outside in the tunnel after the ball game and get it on some more? You don't come into the OB, baby."<sup>62</sup> Lamar Thomas, a former wide receiver for the University of Miami, and now alas, also a former announcer for Comcast Sports, dismissed him for his comments and also deleted from their video records of the brawl.<sup>63</sup>

### *C. The Propriety of Applying Criminal Law to Regulate Play in Competitive Contact Sports*

In a competitive contact sport, athletes occasionally fall to purposefully or knowingly causing injury rather than superior play. But why such reticence in bringing the criminal law into play to sanction thuggish conduct causing grievous bodily harm? There is clarity in applying the criminal law to deliberate injurious conduct between athletes off the field of play. But there is no clarity in applying criminal law to deliberate, injurious misconduct between athletes on the field of play. There are several reasons for the lack of clarity in evaluating criminal misconduct in on-field play. Chief among these reasons is that the promotion of legitimate, vigorous competitive contact sport is an exceedingly worthy goal in a free society.<sup>64</sup> A second is the conviction borne of historical origins that competitive contact sports are vicious by nature, and violence, if anything enhances

<sup>61</sup> ESPN.com, Canes Analyst Thomas Fired For Comments During Brawl, Oct. 16, 2006, <http://sports.espn.go.com/espn/print?id=2628184&type=story>.

<sup>62</sup> *Id.*

<sup>63</sup> See Erik Brady and Dick Patrick, *With Brawl In National Headlines, Miami's Reputation Takes Step Backward*, USA TODAY, Oct. 17, 2006, [http://www.usatoday.com/sports/college/football/acc/2006-10-16-miami-cover\\_x.htm](http://www.usatoday.com/sports/college/football/acc/2006-10-16-miami-cover_x.htm). The University of Miami has won five national championships since 1983 and has history of fighting during games. They engaged in post game fight after losing forty to three (40-3) to Louisiana State University in December 2005, and almost fought on September 16, 2006 with University of Louisville after stomping on the Louisville logo at midfield. The 1990s Hurricanes' rivalry with the University of Notre Dame was lampooned as "Catholics vs. Convicts." Before the 1987 Fiesta Bowl for the National Championship, Penn State players wore coats and ties while Miami players wore fatigues. See *id.*

<sup>64</sup> See BrainyQuote.com, Vince Lombardi Quotes, [http://www.brainyquote.com/quotes/authors/v/vince\\_lombardi.html](http://www.brainyquote.com/quotes/authors/v/vince_lombardi.html) (last visited Feb. 18, 2007) (quoting Vince Lombardi as saying "[w]inning is not everything; it is the only thing.").

its entertainment value.<sup>65</sup> And, third, it may be argued that self-policing through creating and enforcing the rules of the game adequately safeguard players from deliberate, injurious conduct.<sup>66</sup>

i. Sporting Violence as Low Entertainment and the Increasing Concern for Player Safety

In American Football, the “big hit” is entertainment. It plays to base instincts. During the 2006 NFL Season, a regular piece on an ESPN Toyota Half Time show featured re-plays of exceptionally violent hits. At each resounding hit, the announcers colorfully exclaimed: “He got jacked up!”<sup>67</sup> So too WWIX TV, the National Broadcast Company affiliate in Cincinnati, features a Carstar Collision of the week which routinely features especially violent on-field hits.<sup>68</sup> One example of “big hit” entertainment following an interception is when Green Bay Packers offensive lineman Chad Clifton lightly ran twenty-five yards behind the play. Out of nowhere, Tampa Bay Buccaneers defensive lineman Warren Sapp viciously leveled Clifton, knocking him out for the rest of the season.<sup>69</sup> Clifton had no chance of factoring into the play and did not see Sapp prior to the hit. While the hit was legal under NFL rules, it was clear that Sapp intended to hit Clifton as hard as he could and possibly to injure as well.<sup>70</sup> Sapp knew that this hit would have nothing

<sup>65</sup> See Sally Otos, *Cohen v. Brown University: Sports in the Legal Arena*, 3 SPORTS LAW. J. 141, 162 (1996) (stating that athletes are taught to use their bodies as machines and weapons with which to annihilate opponents).

<sup>66</sup> See NFL.com, Digest of Rules-Protection of Passer, <http://www.nfl.com/fans/rules/protectionofpasser> (last visited Feb. 18, 2007) (providing one prominent example of such rules include those concerning protection of the passer. Rule five in this category specifically states: “[o]fficials are to blow the play dead as soon as the quarterback is clearly in the grasp and control of any tackler, and his safety is in jeopardy.”).

<sup>67</sup> Michael David Smith, *ESPN Unveils Kinder, Gentler “Jacked Up!” Segment*, Sept. 11, 2006, <http://nfl.aolsportsblog.com/2006/09/11/espn-unveils-kinder-gentler-jacked-up-segment/>.

<sup>68</sup> See Mike Breen, *Sunday Night Quarterbacks*, [http://www.best-of-cincinnati.com/feature\\_jocks.html](http://www.best-of-cincinnati.com/feature_jocks.html) (last visited Feb. 18, 2007) (asserting Carstar Quality Collision Service sponsors “Collision of the Week” highlight).

<sup>69</sup> See ProFootballWeekly.com, With Whom Do You Side In the Warren Sapp-Mike Sherman flap, Nov. 30, 2002, <http://www.profootballweekly.com/PFW/Features/NFL+Features/2002/Question113002.htm> (describing play as “an innocent-looking play turned vicious.”).

<sup>70</sup> See William C. Rhoden, *Sports of the Times; Violent Sport Must Control the Violence*, NY TIMES, Nov. 30, 2002, at D1 (offering that in such situations, difference between a devastating hit and pulling back is professional respect).

to do with the outcome of the play. Possibly its only purpose was to injure Clifton and knock him out of the game. While he was acting within the rules of the game, Sapp arguably demonstrated sufficient *mens rea* in causing an injury and that is certainly an appropriate basis to assess criminal liability.

Examples of criminally unsportsmanlike violence abound in college as well. In 2006, an Iowa defensive lineman punched an opposing player in the face after tearing off his helmet in the course of a play.<sup>71</sup> There are many examples of arguably cheap shots such as this in football, so many that they do not gain much attention from the media.<sup>72</sup> Late hits and helmet-to-helmet hits are especially indicative of intent to cause grievous bodily injury and should be subject to the criminal sanction in extreme cases.

There are limiting aspects to the "big hit" form of entertainment in that highly regarded players who are frequently featured to ensure competitive success and to delight fans are also the same players most likely to succumb to the debilitating injury. The knee injuries suffered by Palmer and to a lesser extent, Rothlisberger in 2005, begat a new NFL rule which bars a defensive player from hitting a quarterback at or below the knees when the quarterback has one or both feet on the ground.<sup>73</sup> Concerns for maintaining a viable entertainment product motivated this change as much as player safety. Atlanta Falcons General Manager, and NFL Competition Committee Co-Chairman Rich McKay, explained that the quarterback position is a defenseless position when his feet are on the ground and he's throwing the football. Thus, he stated "[w]e have to find ways to protect him . . . . We know how important [the quarterback] is to the franchises and the stability of the franchise," and what quarterback injuries have done to certain teams over the years.<sup>74</sup>

<sup>71</sup> Tim May, *Penton Likely To Play More Against Spartans*, Oct. 11, 2006, <http://www.buckeyextra.com/?story=dispatch/2006/10/11/20061011-C3-02.html>.

<sup>72</sup> See Thewizardofodds.com, *Cheapest Shots of the Year*, <http://thewizardofodds.blogspot.com/2006/12/cheapest-shots-of-year.html> (last visited Feb. 18, 2007) (positing list of more cheap shots in college football during 2006 season).

<sup>73</sup> See NFL.com, *Digest of Rules-Protection of Passer*, <http://www.nfl.com/fans/rules/protectionofpasser> (last visited Feb. 18, 2007) (quoting "[n]o defensive player who has an unrestricted path to the quarterback may hit him flagrantly in the area of the knee(s) or below when approaching in any direction.").

<sup>74</sup> Vito Stellino, *NFL Rule Changes Possible*, TIMES UNION, Mar. 23, 2006, available at [http://www.jacksonville.com/tu-online/stories/032306/jag\\_21428643.shtml](http://www.jacksonville.com/tu-online/stories/032306/jag_21428643.shtml) (stating how important it is to protect safety of NFL players).

At the conclusion of every American football season, the NFL's Competition Committee evaluates the game and suggests rule changes to improve the competitive nature of the game, its entertainment value, and to improve upon player safety.<sup>75</sup> In 2006, the NFL Competition Committee cited player safety as the reason for five rule changes.<sup>76</sup> The rule changes were as follows:

- If possible, rushing defenders must make a conscious effort to avoid low hits on the quarterback. Previously, defenders were not required to make a conscious effort to avoid low hits if momentum was a factor. Penalty: Roughing the passer, loss of 15 yards.
- The prohibition against blocking in the back above the waist applies to a player on the kicking team while the ball is in flight during a scrimmage kick. Previously, this was not a foul. Penalty: Blocking in the back, loss of 10 yards.
- All players are prohibited from grabbing the inside collar of the back of the shoulder pads or jersey, or the inside collar of the side of the shoulder pads or jersey, and immediately pulling down the runner. This does not apply to a runner who is in the tackle box or to a quarterback who is in the pocket. Previously, the "horse-collar" tackle rule did not include the back of the shoulder pads or jersey. This increases the scope of the rule. Penalty: Unnecessary roughness, loss of 15 yards.
- During a field goal attempt or a PAT [point after attempt], any defensive player within one yard of the line of scrimmage at the snap must have his helmet outside the snapper's shoulder pad. This will provide protection to the snapper, who is in a defenseless position. Penalty: Illegal formation, loss of five yards.

<sup>75</sup> See Scout.com, NFL Rule changes for 2006, <http://nflxperts.scout.com/2/556118.html> (last visited Feb. 18, 2007) (stating that NFL Competition Committee spends each off season evaluating and suggesting new rules).

<sup>76</sup> See *id.*

- No more than six players may line up on the same side of a formation on a kickoff. Previously, teams could “load up” one side with more players for onside kicks. Penalty: Illegal formation, loss of ten yards and re-kick at the option of the receiving team.<sup>77</sup>

Player safety is an increasing concern in the NFL.<sup>78</sup> Similarly, college football enacted new rules against “spearing” (hitting with the helmet) to protect players and to reduce injuries.<sup>79</sup>

ii. Are the Rules of the Game Adequate Safeguards of Player Safety?

National Football League play is perhaps as violent as any modern popular sport. NFL coaches and officials have become increasingly concerned to promote player safety by penalizing teams whose players engage in injury prone violence.<sup>80</sup> The problem remains however that the rules and practices of the game are set at the highest level of competition where highly skilled athletes are experienced and well trained to play in very hazardous activity and are extremely well compensated to accept the risks inherent in such hazardous activity.<sup>81</sup> These same rules and practices apply at every level of competition with only slight modification to accommodate lesser size and ability. This is not to say that the criminal law should be any less concerned to protect highly trained, top professional athletes who are paid extravagant sums to play. It is merely a necessary observation that the rules and practices established for

<sup>77</sup> *Id.*

<sup>78</sup> See NFL.com, Vic Carucci, *Owners Have Full Agenda at Meetings*, Mar. 25, 2006, <http://www.nfl.com/news/story/9337001> (quoting that “[p]layer safety is the emphasis of several proposals that the league’s competition committee has submitted for voting by the owners.”).

<sup>79</sup> See MSNBC.com, *Safety First: NCAA Changes Spearing Rule*, <http://www.msnbc.msn.com/id/9088803/> (last visited Feb. 18, 2007) (stating that changing this rule should lead to safer games).

<sup>80</sup> See NFL.com, *Digest of Rules-Summary of Penalties*, <http://www.nfl.com/fans/rules/penaltysummaries> (last visited Feb. 18, 2007) (listing nineteen safety oriented rules, infractions of which are penalized by moving ball 15 yards against offending team).

<sup>81</sup> See Daniel Gross, *The N.F.L.’s Blue-Collar Workers*, NY TIMES, Jan. 21, 2007, at 5 (stating average NFL player’s salary is \$1.3 million); see also Paul Zimmerman, *Unnecessary Roughness*, Nov. 16, 2006, [http://sportsillustrated.cnn.com/2006/writers/dr\\_z/11/16/correctness/](http://sportsillustrated.cnn.com/2006/writers/dr_z/11/16/correctness/) (noting quarterback injuries attract most attention but other players are “getting massacred, legally clipped, cut off at the legs by one or more blockers, crippled from behind”).

top level play of activity, sporting, or otherwise, sets the paradigm for the lower levels of play and for all manner and quality of competitors.<sup>82</sup> The appropriateness of applying the criminal sanction to curb criminal aggression in competitive contact sports becomes more palatable the more we acknowledge the high financial incentive to win in professional sports. The prevalence of criminal thuggery masquerading as legitimate sport skews the validity of implied consent as a defense to “attacks.” And, the validity of implied consent becomes considerably less palatable at lower levels of play where financial compensation for known risk taking is entirely lacking and the vulnerability to criminal thuggery masquerading as legitimate sport is unacceptably high.<sup>83</sup>

Game penalties and league fines address naturally occurring misadventure owing to the culture of violence, speed, and competitive nature of football. Their goal is to enhance the competitive environment. They are ill conceived and too erratically applied to ensure against purposeful or knowing misconduct.<sup>84</sup> Criminal misconduct is beyond the scope of the rules.

<sup>82</sup> See Joey Johnston, *They Said It*, TAMPA TRIB., Jan. 6, 2002, at 6 (quoting Steve Spurrier in 1996 accusing Florida State University players of intentional late hits on quarterback Danny Wuerffel); see also *Run-Oriented Rivals Ready to Knock Helmets Again*, ST. PETERSBURG TIMES, Sept. 1, 2006, at 5 (billing an East Bay High School football game as a good one to attend if you like to watch kids run around hitting each other).

<sup>83</sup> See Bill Finley, *A Single Goal in Common*, NY TIMES, Dec. 17, 2006, at 3 (finding that overambitious coaches and parents have forgotten that youth sports are suppose to be about fun); see also LOCAL6.COM, *Youth Football Coach Accused of Having “Hit List”*, Oct. 10, 2005, <http://www.local6.com/news/5072386/detail.html> (providing City of Leesburg, Virginia cancelled youth football last year when accusations surfaced that Youth Football Coach created hit list that may have led to an eleven-year-old boy having his wrist shattered when he was intentionally tripped by another boy after scoring touchdown).

<sup>84</sup> On NFL Sunday, October 8, 2006, Kansas City Chiefs’ running back Larry Johnson caught a short pass and turned it into a seventy-eight-yard gain to the Arizona Nine with two to thirty-one (2:31) left in the game. Johnson would have scored if Arizona Cardinal cornerback Antrel Rolle had not grabbed him by the facemask and twist his head backward. Rolle did not even let go of the facemask as the two players tumbled out of bounds. The Cardinals lost the game twenty-three to twenty (23-20). The league fined Rolle \$12,500. It is his second fine for an excessive hit. See Nancy Gray, *At Long Last, the Sun Comes Out, and Alex Smith can Smile Again*, SAN FRANCISCO CHRON., Oct. 15, 2006, at C9. The very next week on October 15, 2006, the Pittsburgh Steelers beat the Kansas City Chiefs forty-five to seven (45-7). In that game, Johnson ran down safety Troy Polamalu on an interception and tackling him by his long hair streaming out the back of Palamalu’s helmet. Game officials penalized Johnson not for his hair-only-tackle (which is not an infraction of the rules), but for yanking Polamalu down out of bounds to touch off a brief skirmish. Johnson said: “I made the tackle, tried to get up and my hand was full of

The rules and practices of the game can not be completely relied upon to ensure a safe playing environment because administrators, coaches, and referees who establish the rules and practices of the game are primarily concerned with and defined by the sport. Criminal law as a vehicle to inculcate values and behavioral modification, reflects a broader public interest than any sport, and by way of contrast, a government, which is representative of the body politic at large, is positioned to take a larger, societal view than any group of sports administrators, coaches, and referees. The broader interest is especially important to set standards of safety at the highest levels as well as the lowest levels of competition. The line between criminal contact and legitimate sports contact must necessarily be drawn by the body politic from which citizens of sport emerge and to which they repair.

iii. When Might Vigorous Competition Become Illegitimate?

There can be no fear that a limited and precise introduction of the criminal sanction to on-field play in competitive contact sports goes too far. As with landmark interest in curbing domestic violence, a culture of sports violence should not go unnoticed by the criminal law. To say that criminal behavior occurring in competitive contact sports is beyond the reach of criminal law is to say to little by way of deterrence in criminal law and too much for competitive contact sports by way of integrating criminal harms from illegitimate play into the context of the game. The conceptual barrier to criminal sports batteries should fall for the same reason that barriers to criminalizing domestic batteries fell, and that is an excess of criminal like injuries occurring in competitive contact sports. Implied consent may be overextended given the level of malevolence that sometime occurs in American football. The law

his hair. I hope I got penalized for hitting Ike Taylor in the face twice and not for pulling Troy's hair." See Tony Grossi, *Tressel in a Brown Sweater Vest?*, PLAIN DEALER REP., Oct. 22, 2006, at C11. NFL Director of Officiating Mike Pereira has ruled that pulling hair was like pulling a shirt. See John McClain, *Week 7; Pro Football; Vikings Twice as Nice in Tice's Second Season*, HOUSTON CHRON., Oct. 19, 2003, at 4. The difference is that unlike pulling a shirt, a vicious jerk of the head by grabbing long hair is just as likely to cause a neck injury as grabbing a facemask. NFL rules permit the former, but penalize the latter. See John McClain, *Week 7; Pro Football; Vikings Twice as Nice in Tice's Second Season*, HOUSTON CHRON., Oct. 19, 2003 at 4.

of rape and sexual assault protects sex professionals even though their consensual activity places them at certain risk of criminal violence. Likewise, the law of homicides and aggravated battery should protect athletes even though athletes engage in competitive contact sport which places them at certain risk to violence, even criminal violence. No player assumes the risk of, or consents to, criminal conduct simply by engaging in an activity where serious bodily injury or death is higher than other professional and recreational activities. No sport or business should immunize criminal thuggery from prosecution because to do so violates public interest.

#### iv. Too Much Litigation?

America is a litigious society and there is a fear that given the choice between legal and non-legal remedies, disputants might all too quickly opt for the legal remedy. The legal process is intrusive on all parties, cumbersome, expensive, unwieldy, and too cost prohibitive for all but the most compelling cases.<sup>85</sup> At the early stages, an over reliance on legal solutions is not necessarily a bad thing as the formality of law and the expertise of lawyers provides for the most compelling way to change behavioral modification and has the widest effect in educating the general population as well as inculcating new values into a sports culture.<sup>86</sup> The right mix of criminal and administrative sanctions will be found fairly quickly.

#### D. The Goal of a Creating a Sports Battery

In determining the point at which a controlled, intentional attack on a fellow competitor crosses the line to criminal misconduct, it is argued here that a controlled, intentional attack

<sup>85</sup> See Kenneth Einar Himma, *Technology, Values, and the Justice System: Towards A Theory of Legitimate Access: Morally Legitimate Authority and the Right of Citizens to Access the Civil Justice System*, 79 WASH. L. REV. 31, 49 (2004) (noting that significant number of Americans living below the poverty level are not being provided for by the civil justice system); see also Peter J. Riga, *Spirituality of Lawyering*, 40 CATH. LAW. 295, 300 (2001) (stating few can afford the high prices of lawsuits).

<sup>86</sup> See Matthew Gilligan, *Stalking the Stalker: Developing New Laws to Thwart Those who Terrorize Others*, 27 GA. L. REV. 285, 300-01 (1992) (stating criminal sanctions educate the public about the crime, deter crime and punish those who are undeterred); see also Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 78 (2000) (explaining purpose of criminal law is to deter criminal behavior).



designed to cause grievous bodily harm should be recognized in law even if masquerading as a legitimate sporting objective. Whether a controlled, intentional attack on a fellow competitor crosses the line to criminal misconduct should depend as much on the nature of the injury suffered as on how the injury is inflicted. The primary basis for criminal liability in competitive sports should be purposeful or knowingly causing serious bodily injury or death. The primary bar to criminal liability is implied consent or assumption of risk.<sup>87</sup> Thus there are really two questions we seek to answer. First, given that exerting brute force is a permissible intent in competitive contact sports, when is the line crossed to criminal intent. Second, given the doctrines of implied consent and assumption of risk, what if any risks are not inherent risks of the game or what if any acts are different in kind from those for which consent is implied?

From a criminal law perspective, the starting point for competitive contact sport, the same for any other socially approved activity is to promote an expectation that participants walk off the field of play substantially physically intact the same as when they walked on to the field. It is easy to recognize that an athlete assumes the risk of injury due to self-inflicted physical strain from extreme physical exertion, as well as the risk of injury from the clash of physical exertion from others that is inherent in legitimate competitive play. It is not so easy to recognize exactly what risks are inherent in the game and to what extent an athlete can be assumed to grasp risks that go beyond rules, which are themselves applied subject to wide discretion exercised by game officials, to include something as nebulous as the practices of the game. Sports injuries can be, and often are, serious, but at the end of the day, athletes generally expect to walk away from the field of sport suffering no more than minor bumps and bruises resulting from legitimate athletic play, and not criminal attempts to render an opponent athlete

<sup>87</sup> See Charles Harary, *Aggressive Play or Criminal Assault? An in Depth Look at Sports Violence and Criminal Liability*, 25 COLUM. J.L. & ARTS 197, 205 (2002) (asserting "participation in a sport provides automatic consent to certain contact encountered during the usual course of competitive athletic events even if this contact can, or does, produce serious injury."); see also Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL'Y 145, 160 (2002) (finding that if prosecutions for sports battery are to succeed the courts must take into account the implied consent defense to violence occurring during contact sports).

less capable. Even where major injuries inevitably occur due to excessive risk taking during play, no athlete should have to also suffer thuggish attacks masquerading as legitimate play. It must be the goal of criminal law to promote basic human safety even where consensual activity places participants at a certain risk level for some injuries.

It seems quite impossible to derive a criminal law applicable to competitive sports by the simple expedient of piercing the unjustified bubble of de facto immunity that exempts the athletic world from criminal liability except for the most egregious cases. Instead, it seems only sensible to start anew with a new offense that clearly places competitive sports participants on notice.

Any definition of criminal sports battery that did not rely on objective, clearly defined rules and objectives consistent with the rules and practices of a particular sport would almost certainly run afoul of constitutional limits in defining crime. Athlete and coach must know at the outset what the prohibited conduct is and how to avoid the prohibited conduct. The Emperor Nero's infamous contribution to legal inanity was in posting the law of the land too high for the common man not on horseback to be able to read.<sup>88</sup> We must posit clear objective standards to avoid the same due process fiasco.

It is also important from the standpoint of judicial economy that the standard for evaluating the possible occurrence of a criminal sports battery must be easily understood and efficiently applied standard. What it lacks in judicial insight, can more than be made up for in judicial economy. Multi-factored tests are theoretical; bright line rules are more practical. A newly proposed rule must be manageable to be useful.

<sup>88</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (discussing Nero's habit of posting laws high on pillars so that they would be harder to read and easier to break); see also Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2195 (2003) (explaining Nero's practice of posting edicts high on pillars).

*E. Review of American Statutes*<sup>89</sup>

Several states have passed special interest tort legislation directed at protecting major tourist recreational sports attractions. Montana passed legislation setting up a liability regime for snowmobiles.<sup>90</sup> Montana specifically states that “[a] snowmobiler shall accept legal responsibility for injury or damage of any kind to the extent that the injury or damage results from risks inherent in the sport of snowmobiling.”<sup>91</sup> The Montana statute also specifies the risks inherent in the sport.<sup>92</sup> Similarly, New York<sup>93</sup> and Vermont<sup>94</sup> each have a statute which specifically assigns duties and liabilities for ski area operators and skiers.<sup>95</sup> Interestingly, the State of Ohio has passed comprehensive statutes involving roller skating<sup>96</sup> and equine activities,<sup>97</sup> which explicitly assign risks inherent in the respective activities.<sup>98</sup> Utah passed a statute specifying assumption of risk at shooting ranges.<sup>99</sup> The Utah statute is fairly typical of such special interest legislation. The statute reads:

Each person who participates in shooting at a shooting range accepts the associated risks to the extent the risks are obvious and inherent. Those risks include injuries that may result from noise, discharge of projectile or shot, malfunction of shooting equipment not owned by the shooting range, natural variations in terrain, surface or subsurface snow or ice conditions,

<sup>89</sup> See Appendix A for a compilation of American statutes codifying common law assault and battery or otherwise addressing sport related issues such as premise liability, assaults on sports officials, or special interest legislation for select sports.

<sup>90</sup> See MONT. CODE ANN. § 23-2-654 (2005) (detailing snowmobiler’s assumption of responsibility and duties).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See NY CLS GEN. OBLIG. § 18-103 (2007) (stating duties of ski area operators); see also NY CLS GEN. OBLIG. § 18-105 (2007) (stating duties of skiers).

<sup>94</sup> See 12 V.S.A. § 1038 (2007) (stating skier’s duties).

<sup>95</sup> See CLS GEN. OBLIG. § 18-103 (2007) (stating duties of ski area operators); NY CLS GEN. OBLIG. § 18-105 (2007) (stating duties of skiers); 12 V.S.A. § 1038 (2007) (stating skier’s duties).

<sup>96</sup> See OHIO REV. CODE ANN. § 4171.01 (2006).

<sup>97</sup> See OHIO REV. CODE ANN. § 2305.321 (2006).

<sup>98</sup> See OHIO REV. CODE ANN. § 4171.01 (2006); OHIO REV. CODE ANN. § 2305.321 (2006).

<sup>99</sup> See UTAH CODE ANN. § 47-3-2 (2006).

bare spots, rocks, trees, and other forms of natural growth or debris.<sup>100</sup>

Finally, West Virginia passed special interest legislation protecting owners of whitewater rafting facilities by recognizing inherent risks and assigning same to participants.<sup>101</sup> Likewise, forty-five states have passed special interest legislation setting out duties and liabilities of owners and managers of sports facilities and premises.<sup>102</sup>

There is a real dearth of criminal statutes addressing competitive contact sporting activities. A minority of states have passed statutes imposing criminal misdemeanor or lesser felony level penalties for limited focus statutes.<sup>103</sup> Florida has a statute prohibiting amateur mixed martial arts and all martial matches must be sanctioned by an organization, which is approved by a state commission.<sup>104</sup> Likewise, all professional matches must comply with rules adopted by a State Commission.<sup>105</sup> Georgia has codified safety rules and regulations governing professional boxing primarily to provide medical safeguards.<sup>106</sup> Louisiana passed a criminal prohibition of tough man competitions.<sup>107</sup> There is also a small minority of states, Alabama,<sup>108</sup> Florida,<sup>109</sup> Louisiana,<sup>110</sup> and Massachusetts,<sup>111</sup> with criminal statutes specifically protecting sports officials from abuse by fans.<sup>112</sup>

<sup>100</sup> *Id.*

<sup>101</sup> See W. VA CODE § 20-3B-1 (2007).

<sup>102</sup> See statutory compilation at Appendix A.

<sup>103</sup> See Yates & Gillespie, *supra* note 81 at 214 (stating that one reason violence remains a part of sports that the leagues rather than the states have assumed the role of regulating violent conduct).

<sup>104</sup> See FLA. STAT §548.008 (2006).

<sup>105</sup> See FLA. STAT §548.008 (2006).

<sup>106</sup> See GA. CODE ANN. § 43-4B-7 (2006). The statute provides rules and regulations for professional boxing within Georgia. *See id.*

<sup>107</sup> See LA. REV. STAT. ANN. § 14:102.11 (2006). The statute imposes criminal liability on individuals involved in illegal contact sports. *See id.*

<sup>108</sup> See ALA. CODE § 13A-11-144 (2006). The statute seeks to protect sport officials by holding harassing fans criminally liable. *See id.*

<sup>109</sup> See FLA. STAT. ANN. § 784.081 (2006). The statute holds individuals liable for assault and battery of sports officials. *See id.*

<sup>110</sup> See LA. REV. STAT. ANN. § 14:34.4 (2006). The statute holds individuals liable for the battery of school sporting officials. *See id.*

<sup>111</sup> See MASS. ANN. LAWS ch. 272 § 36A (2006). The statute imposes a criminal fine on individuals making obscene or slanderous statements to sports officials. *See id.*

<sup>112</sup> See e.g., LA. REV. STAT. ANN. § 14:34.4 (2006); ALA. CODE § 13A-11-144 (2006); FL. STAT. ANN. § 784.081 (2006) (imposing criminal liability on individuals committing battery, assault, or harassment against sports officials).

California<sup>113</sup> and Maryland<sup>114</sup> have criminal statutes that address fan behavior at sporting events more broadly than just abuse of officials.<sup>115</sup>

Likewise a review of existing scholarship finds a fair number of articles addressing tortious liability. In a piece published in the Northwestern University Law Review, Professor Fitzgerald analyzes the application of the torts doctrine of inherent risk to coaching negligence.<sup>116</sup> Professor Fitzgerald concludes that modified comparative negligence comports with the well-established goal of loss avoidance, while at the same time preserving the vigorous nature of athletic competition.<sup>117</sup> Coaches maintain discretion under a modified negligence approach, and, as explained by Professor Fitzgerald, liability attaches only if the coach is more than fifty percent responsible for injury to an athlete under his care.<sup>118</sup> A second article more closely on topic by Professor Yasser also applies inherent risk doctrine and concludes that comparative negligence optimizes safe behavior without detracting from vigorous competition.<sup>119</sup>

## I. RELEVANCE OF THE RULES OF THE GAME

Obedying the rules is an integral part of playing any sport. Only when all participants agree to be bound by the constitutive rules of the game can a contest take place. Without agreed upon rules, there can be no game and similarly, playing outside the rules cannot be considered playing the game at all. The first

<sup>113</sup> See CAL. PENAL CODE § 243.83 (2006). The statute outlines unlawful actions for attendees of professional sporting events such as throwing objects. See *id.*

<sup>114</sup> See MD. CODE ANN., CRIMINAL LAW § 10-203 (2006). The statute prohibits interference by attendees of professional sporting events. See *id.*

<sup>115</sup> See CAL. PENAL CODE § 243.83 (2006); MD. CODE ANN., CRIM. LAW § 10-203 (2006) (prohibiting fan interference at sporting events).

<sup>116</sup> See Timothy B. Fitzgerald, *The "Inherent Risk" Doctrine, Amateur Coaching Negligence, and the Goal of Loss Avoidance*, 99 NW. U. L. REV. 889 (2005). The article examines the increasing problem of sports related injuries in a legal context. See *id.*

<sup>117</sup> See Fitzgerald, *supra* note 110, at 925 (noting that while athletes participate with knowledge of risk of injury, coaches may be comparatively negligent for failing to inform or provide safe environments).

<sup>118</sup> See Fitzgerald, *supra* note 110, at 927 (stating that under Illinois' comparative negligence statute, coaches would not be apportioned fault unless he or she were more than fifty percent liable).

<sup>119</sup> See Ray Yasser, *In the Heat of the Competition: Tort Liability of One Participant to Another; Why Can't Participants Be Required to be Reasonable?*, 5 SETON HALL J. SPORT L. 253, 270 (1995) (finding that "[u]nder comparative negligence statutes, a contributorily negligent plaintiff is not necessarily precluded from recovery.").

problem is that a uniform system of rules and a penalty scheme for their infraction is inadequate to address intentional rule violations, which purposely or knowingly cause serious injury. Sport generally presumes out of self-preservation that true sportsmen players will not purposely or knowingly intend to kill or cause grievous bodily injury to each other. Thus, rules proscribing such actions are never thought to be necessary. The second problem is that the rules are only reactively designed and enforced to ensure a safe environment for play. Adjustments are made only after the incidence of grievous bodily injury clearly becomes profound, and even then usually in the off season.<sup>120</sup> The third problem is that concrete rules, no matter how comprehensive, cannot completely describe the permissible universe of acceptable play and risks involved in the game. What must be added to the mix is sports practices. Competitive contact sports are played not just according to the written rules, but also to a practice of the sport, which regardless of experience and familiarity with the game, cannot be sufficiently described to clarify the true risks involved in the game.

#### A. *The English Rule*

The English Rule allows that regardless as to whether the injury causing act occurred on the field of play or elsewhere, the injury-causing challenge may be judged criminal if the requisite *mens rea* is present; however, play within the rules supports a rebuttable presumption that the actor did not injure with malice or intentionally or knowingly engage in activity likely to result in death or injury.<sup>121</sup> This rule is found in *Regina v. Bradshaw*,<sup>122</sup> a case decided in 1878 involving a soccer match in which the defendant charged the deceased after the ball had been played, catching him hard in his stomach with his knees and rupturing his intestines. The deceased died the next day from a rupture of

<sup>120</sup> See Wikipedia.org, [http://en.wikipedia.org/wiki/Jack\\_Tatum](http://en.wikipedia.org/wiki/Jack_Tatum) (noting that Jack Tatum's hit on Daryl Stingley in which he lead with his helmet, or spearing, became barred by NFL rules only after Stingley's injury).

<sup>121</sup> See *Regina v. Bradshaw*, 14 Cox C.C. 83 (Leicester Spring Assizes 1878).

<sup>122</sup> *Id.*

the intestines.<sup>123</sup> Lord Justice Bramwell in summing up the case to the jury said:

The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death and the question is whether the act was unlawful. *No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law says that you shall not do that which is likely to cause the death of another.* For instance, no persons can by agreement go out and fight with deadly weapons, doing by agreement what the law says shall not be done and thus shelter themselves from the consequences of their acts. Therefore in one way you need not concern yourselves with the rules of football [soccer]. *But on the other hand if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention and that he is not acting in a manner which he knows will be likely to productive of death or injury.* But independent of the rules, if the prisoner intended to cause serious hurt to the deceased or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act and you must find him guilty; if you are of the contrary opinion, you will acquit him.<sup>124</sup>

[Lord Justice Bramwell] carefully reviewed the evidence, stating that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country,

<sup>123</sup> In an American football analogy to Bradshaw's injury, on September 24, 2006 in Tampa Bay, quarterback Chris Simms played through an entire game after suffering violent hits to his midsection in a losing effort against the Carolina Panthers. Simms required emergency surgery to remove a split spleen immediately after the game. Simms was out for the remainder of the 2006 season and is expected to play in the 2007 season. See ESPN.com, *Bucs Quarterback Simms Land on Season-Ending IR*, <http://sports.espn.go.com/nfl/news/story?id=2648788> (last visited Feb. 23, 2007).

<sup>124</sup> See *Regina*, 14 Cox C.C. 83 (Leicester Spring Assizes 1878).

all of which were no doubt attended with more or less danger.<sup>125</sup> The verdict was not guilty.<sup>126</sup>

The English Rule presumes that no rules or culture or practice of any game can make that lawful which is unlawful by law of the land; and the law says you shall not cause death or grievous bodily injury of another.<sup>127</sup> Thus, under the English Rule, the rules of the game are not dispositive for or against criminal guilt, rather they provide evidentiary significance as to the mental state of the defendant. Because the verdict of acquittal in *Regina v. Bradshaw* was not criticized even in a case involving a sports death, the presumption of fair play that the player who injures or causes death on the field of play did not act with malice or intent to injure or knowingly engage in conduct likely to cause injury, would be very difficult for the prosecution to rebut. Rhetorically excessive pre-game bravado would not likely rebut the presumption of a legitimate sporting objective. Perhaps, if the death or injury causing act occurred during a flagrant breach of the rules, the presumption of fair play would not be triggered automatically.

### B. The American Rule

The American Rule holds that if the rules and practices of the game are reasonable, consented to by all engaged, and are not likely to induce grievous bodily injury or death, then injuries, even fatal injuries occurring on the field of play are excused.<sup>128</sup> The American Rule is stated in *People v. Fitzsimmons*.<sup>129</sup> That case involved an exhibition boxing match in which a punch killed the opponent and led to a charge of homicide.<sup>130</sup> In charging the jury, the Judge stated:

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *Regina*, 14 Cox C.C. 83 (Leicester Spring Assizes 1878).

<sup>128</sup> See *People v. Fitzsimmons*, 34 N.Y.S. 1102, 1106-09 (1895). The court discussed factors to be considered such as whether the decedent could lawfully consent to participate in the boxing match and whether the defendant participated with the criminal intent of inflicting injury. See *id.*

<sup>129</sup> 34 N.Y.S. 1102 (1895).

<sup>130</sup> See *id.* at 1102. There were conflicting accounts of the deadly blow as some witnesses described the hit as a "light tap," while others described the decedent as slumping to the ground after the hit. See *id.*



If the rules of the game and the practices of the game are reasonable, are consented to by all engaged, are not likely to induce serious injury, or to end life, if then, as a result of the game, an accident happens, it is excusable homicide.<sup>131</sup>

Finding the punch to have been thrown within the rules of boxing, and that the rules themselves were reasonable, the jury returned a verdict of not guilty.<sup>132</sup>

In contrast to the strictly *mens rea* approach under English law, the American approach focuses on the reasonableness of the rules of the game and whether the defendant was playing within rules in pursuit of a legitimate sport objective. The implication under the American rule is that doctrines of consent would negate criminal liability provided that injury occurred within the rules and practices of the game, so long as the rules and practices themselves are reasonable. Thus under the American rule, only acts that occur outside the rules and practices of the game would qualify as candidates for criminal sanction. Whereas consent can negate criminal liability under the American rule, under the English law criminal liability is conclusively established on a finding of *mens rea*.

### C. *The Functional Equivalence of the English and American Rules*

In application, the English and the American rules would not likely yield different results. Since, under English law, following the rules of sport raises a rebuttable, but fairly high presumption of fair play, and, results in a functional equivalent of the American Rule, under which adherence to the rules and practices of the game where the rules and practices themselves are reasonable excuses injury or fatal injury provides a safe harbor even for seriously injurious actions. This observation is borne out in *Regina v. Green*,<sup>133</sup> as well as the practical

<sup>131</sup> *People v. Fitzsimmons*, 34 N.Y.S. 1102, 1109 (1895).

<sup>132</sup> *See id.* at 1102.

<sup>133</sup> [1971] 16 D.L.R.3d 137 (Ont. Prov. Ct. 1970). The case involved two hockey players who engaged in a fight. *See id.* Both participants were tried separately. *See Regina v. Maki*, [1970] 14 D.L.R. (3d) 164 (Ont. Prov. Ct. 1970).

difficulties of applying these rules to the fast paced activity which is competitive contact sport.

*Regina v. Green* involved prosecution for an on-ice fight, which interrupted a National Hockey League exhibition game played September 21, 1969 in the City of Ottawa.<sup>134</sup> The game was between the St. Louis Blues and the Boston Bruins. Wayne Maki played for St. Louis and Ted. Green played for Boston and the two engaged in a fight, disrupting play.<sup>135</sup> The Maki and Green prosecutions are important for several reasons. First, they are the first modern criminal prosecutions involving hockey play in the Western World.<sup>136</sup>

Second, although the Courts applied the English rule, namely that although playing within the rules and practice of the game was not a defense *per se*, both Courts, found that the practices of the game fatally undermined the prosecution's case to prove assault.<sup>137</sup> Applying the English Rule, the *Green* Court gave much deference to the culture of the game as defined by its practices as well as its rules in evaluating the charged misconduct for criminal liability.<sup>138</sup>

We must remember that we are dealing with a hockey game. We are dealing with two competent hockey players at the peak of their form. We are not now dealing with the ordinary facts of life, the ordinary going and coming. We must remember that when we discuss the action of these men we are examining it within that forum and we are discussing it within the context in which the game is played, at a high speed and obviously with people keenly on edge. In these circumstances I find as a fact that Mr. Green's action that night was instinctive and that all he was doing in

<sup>134</sup> See *Maki*, [1971] 14 D.L.R. (3d) 164; see also *Green*, [1970] 16 D.L.R. (3d) 137. These cases are discussed infra in Defenses under the law of self-defense and implied consent at 44-48.

<sup>135</sup> See *Green*, [1970] 16 D.L.R. (3d) 137.

<sup>136</sup> See Harary, *supra* note 81, at 205 (2002) (citing *Maki* and *Green* as two of the first criminally prosecuted cases of sports violence).

<sup>137</sup> See *Green*, [1970] 16 D.L.R. (3d) 137 (suggesting that professional hockey could not be played with the force and vigor necessary during competition without "a great number of what would in normal circumstances be called assaults"); see also *Maki*, [1971] 14 D.L.R. (3d) 164 (observing that athletes, when they step on the playing field, assume certain hazards and risks involved in playing the sport).

<sup>138</sup> See *Green*, [1970] 16 D.L.R. (3d) 137 (pointing out that Mr. Maki testified to being struck in the face hundreds of times, and that this is a common occurrence in a professional hockey game).

effect was warning Mr. Maki not to do what he had done again.<sup>139</sup>

It is apparent here that, a court may indulge a defendant who plays within the rules and practices of the game, and as such would achieve the same result under the American Rule, which exempts otherwise criminal conduct in the same way so long as the rules themselves are reasonable and consented to by all engaged. Under the American Rule, violation of the rules of the game could be construed to show negligence, but not enough negligence to justify a criminal sanction. Likewise, adherence to the rules should not necessarily shield an athlete from criminal liability, if the rules themselves are objectively inadequate to rule maintain a reasonably safe playing area.

Third, both defendants were acquitted in successive trials and thus effectively limiting criminal prosecution to extreme cases.<sup>140</sup> The cases were tried separately and the findings of facts were mutually exclusive. This might be a problem in any multiple prosecution arising out of a single or series of transactions, but the fast and furious pace of competitive sport combined with partisan fans may make for wide variance not only in what is observed, but also in the significance of what is observed. Of course, televised or photographed athletic events lessens this problem, though it is well to remember that even instant replay is not necessarily dispositive. It is both interesting as well as appropriate that each Court seemed to carefully craft its findings of fact to acquit the defendants separately. It is appropriate that defendants receive a high presumption of innocence with a wide margin of doubt. And, quite apparently in the context of competitive contact sports, the presumption of innocence and margin of doubt is hide and wide, respectively.

<sup>139</sup> *Id.*

<sup>140</sup> See Gregory Schiller, *Are Athletes Above the Law? From a Two-Minute Minor to a Twenty-Year Sentence: Regina v. Marty McSorley*, 10 SPORTS LAW. J. 241, 253 (2003) (observing same court that dismissed charges against Mr. Maki also found that Mr. Green's actions were instinctive and "protective in his own interests").

## II. TRADITIONAL CRIMINAL LAW: COMMON LAW OFFENSES AND DEFENSES

The primary basis for criminal liability in competitive sports argued for here is purposeful or knowing criminal conduct. The primary legal bar to criminal liability is implied consent or assumption of risk. Thus there are really two questions we seek to answer in this Section. First, given that the intentional exertion of brute force is a permissible intent in competitive contact sports, when is the line crossed to a criminal misconduct. Second, given the doctrines of implied consent and assumption of risk, what, if any, risks are not inherent risks of the game or what, if any, acts are different in kind from those for which consent is implied?

### A. Offenses

#### i. Simple Assault and Battery

The traditional offenses at Anglo-American common law that might arguably apply to competitive contact sports include: simple assault and battery as well as aggravated battery, mayhem, intentional infliction of grievous bodily harm, homicide, and attempts and conspiracies of same. Battery is an unlawful application of force to the person of another; an offensive touching of one's body.<sup>141</sup> The common law elements of battery include: 1) a force or touching, 2) caused by, 3) an intentional or knowing act.<sup>142</sup> Battery is a general intent misdemeanor at common law.<sup>143</sup> Assault is also a general intent misdemeanor at common law.<sup>144</sup> There are two different forms of assault recognized at common law. In the first form, the majority rule, as recognized at common law, assault describes the offense of unlawfully submitting one to the apprehension of force or the person of another, *i.e.*, an offensive touching of one's

<sup>141</sup> See JOSHUA DRESSLER ET AL., CASES AND MATERIALS ON CRIMINAL LAW 795 (3d ed. 1999) (defining battery as "any unlawful application of force to the person of another willfully or in anger.").

<sup>142</sup> See *id.*

<sup>143</sup> See *id.* (finding that "[b]attery was a common-law misdemeanor").

<sup>144</sup> See 6 AM. JUR., *Assault and Battery*, § 23 (2d ed. 2006) (observing that most jurisdictions deem assault a general intent crime).

mind.<sup>145</sup> The elements of the first form are: 1) threatening conduct, 2) with intent to injure or frighten the victim, 3) and creates a reasonable apprehension of immediate physical harm.<sup>146</sup> Thus the first form of assault focuses on the effect on the victims' state of mind. Under the first form, "present ability" is irrelevant.<sup>147</sup> Thus pointing a gun at someone who did not know the gun was not loaded would still constitute an assault because it places another in reasonable apprehension of immediate physical harm. This reasonable apprehension makes the lack of intent or ability to do a battery unimportant.

Under the minority rule, the second form of assault views the offense as an attempted battery (or more realistically, a battery that failed).<sup>148</sup> This view of battery focuses on the mind of the assailant—what was the intent—rather than that of the harm to the victim. Under this second form, the assault requires "present ability," since ability bears on the intent of the perpetrator.<sup>149</sup> Thus under the second form of assault pointing an unloaded gun at one would not be an assault as such an act would constitute an attempt of an attempt. The elements of the second form of assault are simply: 1) threatening conduct, 2) with intent to injure or frighten the victim.<sup>150</sup>

Competitive contact sports are designed to involve physical contact. Therefore if misdemeanor level assaults and battery applied to competitive contact sports, all that would be left to determine is whether the threatened touching or actual touching is without consent or justification. Given the acceptable level of high speed violence in competitive contact sports as well

<sup>145</sup> See DRESSLER, *supra* note 141, at 795 (noting that the majority of jurisdictions recognized that an action for assault could be maintained against one who intentionally placed another in fear of bodily injury, even if he acted without any purpose or ability to carry out the threat).

<sup>146</sup> See *id.* (defining assault under first form as "intentional subjection of another to reasonable apprehension of receiving a battery," including menacing, as well as actual attempts to do physical harm to another).

<sup>147</sup> See *id.* (pointing out that under first form of assault, an action could be maintained against a defendant even if he acted without purpose or ability to carry out threat).

<sup>148</sup> See *id.* (stating that originally at common law, assault "was simply an attempt to commit a battery.").

<sup>149</sup> See *id.* (noting that "[u]nder such an approach, no assault would be committed if the alleged assailant had no intent to injure or if his gun were unloaded.").

<sup>150</sup> See *id.* (observing that under the second form of assault, most jurisdictions described the offense as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.").

as the very imprecise assessment of risk, play within the rules and practices of the game generally does, and should, provide a safe harbor against minor injuries suffered from simple assaults and batteries.<sup>151</sup>

ii. Aggravated battery and mayhem

Aggravated batteries are simple batteries which are aggravated by the increased incidence of injury or the special status afforded the victim (such as hitting a police officer).<sup>152</sup> Comparisons to the common law mayhem or maiming come readily to mind. Mayhem was a general intent misdemeanor at common law, except where it resulted in castration.<sup>153</sup> Mayhem consists of a violently inflicted injury rendering the victim less able to fight or annoy his enemy.<sup>154</sup> Modern statutes retain this offense, but no longer restrict it to injuries affecting the victim's ability to defend him or herself.<sup>155</sup> Mayhem is essentially a battery aggravated by the intent to do grievous bodily harm. As sports were originally a method to develop, and a way to test, military prowess, mayhem, a battery aggravated by the intent to do grievous bodily harm, provides a fitting precedent for a modern day creation of a sports battery.

<sup>151</sup> See, e.g., *Regina v. Green*, [1971] 16 D.L.R. (3d) 137 (Ont. Prov. Ct. 1970). Judge Fitzpatrick, Provincial Court of Ottawa, Canada upon acquitting a hockey player for battery stemming from a routine hockey fight in a National Hockey League exhibition game, stated:

It is quite probable that in other circumstances and given other sets of facts a charge of common assault might very well stand. However, . . . given the permissiveness of the game and the risks that the players willingly undertake, I find it difficult to envision a circumstance where an offence of common assault as opposed to assault causing actual bodily harm could readily stand on facts produced from incidents occurring in the course of a hockey game played at that level. *Id.*

<sup>152</sup> See 6 C.J.S., *Assault* § 86 (2007) (defining aggravated assault as assault "which has, in addition to the mere intent to commit it, another object which is also criminal").

<sup>153</sup> See John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 595 (2006) (explaining mayhem by castration was more serious and was capital felony).

<sup>154</sup> See *id.* at 594 (defining mayhem).

<sup>155</sup> See Annemarie Bridy, *Confounding Extremities: Surgery at the Medico-Ethical Limits of Self-Modification*, 32 J.L. MED. & ETHICS 148, 153 (2004) (highlighting rationale for mayhem is no longer interest in having body to fight with but in completeness of body).

### iii. The Law of Homicides

The law of homicides describes the causal killing of another. The various levels of homicide are separated only by the *mens rea* or state of mind behind the *actus reus* or criminal act. Proof of first degree murder requires: 1) An intent-to-kill with malice aforethought homicide plus, 2) deliberation: *i.e.*, a cool mind that is capable of reflection and 3) premeditation: *i.e.*, that the cool mind did in fact reflect, at least for a short period of time before the act of killing.<sup>156</sup> Voluntary manslaughter is an intentional killing under provocation or extreme emotional distress.<sup>157</sup> Thus, voluntary manslaughter includes all intentional homicides which are committed with a person-endangering-state-of-mind and are not justified or excused but are perpetrated under circumstances of recognized mitigation.<sup>158</sup> The mental state required to prove voluntary manslaughter might have validity for grievous bodily injury intentionally caused off the field, but as with murder, it would be difficult to prove death as an intended result. Involuntary manslaughter at common law consisted of an unintentional killing which results from the negligent performance of a lawful act or the violation of acts *mala in se*.<sup>159</sup> Criminal negligence (careless disregard of information needed to act safely under the circumstances) is a lesser mental state than criminal recklessness (careless disregard of a known risk) and certainly a much lesser state than criminal intent (knowing or purposely causing a harm).<sup>160</sup> Although involuntary manslaughter is premised on a negligence mental state, to safeguard against chilling legitimate competitive zeal, the acceptable level of high speed violence in competitive

<sup>156</sup> See Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 L. & PSYCHOL. REV. 63, 78 n.109 (2005) (specifying deliberation with intent to kill and premeditation are elements of first degree murder across jurisdictions).

<sup>157</sup> See Myra E. Howard, *State v. Counts: The Simultaneous Availability of the Defenses of Insanity and Extreme Emotional Disturbance in Oregon*, 71 OR. L. REV. 205, 210 (1992) (explaining that voluntary manslaughter is "intentional homicide committed under the extenuating circumstance of 'heat of passion,' provocation, or extreme emotional distress.>").

<sup>158</sup> See *id.* at 209-10 (noting killing is not excused but defense of extreme emotional distress mitigates it to manslaughter).

<sup>159</sup> See Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 220 n.113 (2001) (defining involuntary manslaughter).

<sup>160</sup> See Haeji Hong, Note, *Hacking Through the Computer Fraud and Abuse Act*, 1998 UCLA J.L. & TECH. 1, 5 (1998) (explaining levels of *mens rea*).

contact sports, a conviction for involuntary manslaughter would not be returned except for proof of purposeful or knowing grievous bodily injury causing conduct leading to death.<sup>161</sup>

Fatal injuries, life threatening injuries, or even grievous bodily injuries leading to permanent disability are an appropriate line which even the most violent of competitive contact sports should not cross. It is difficult to conceive that the vast number of boys and girls who aspire to sports stardom at any level do so with the understanding that the sports activity permits conduct that intends or unacceptably risks death or grievous bodily injury. The uninterrupted advance of Anglo-American law not only criminal law, but the law of torts, including the rise of products liability, occupational safety regulations, for example clearly trends toward prohibiting life threatening, dangerous activity and otherwise imposing innumerable safety constraints on necessary socially beneficial life threatening activity.<sup>162</sup> Against this trend, it cannot be argued that the deterrent value of the criminal law has no appropriate application to deter inherently dangerous activity simply because such activity occurs in a sporting context. Nor given the high financial and emotional stakes involved can one safely assume that rational self-interest of the sporting community makes criminal deterrence of life threatening actions unnecessary. If for no other reason, the criminal law is appropriately applied to competitive contact sports because the inherently dangerous activity of sports is a lucrative playground for criminal thugs the same as highly skilled dedicated athletes, and assuming that we can distinguish the two, the latter deserve protection from the former.

<sup>161</sup> See generally Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641, 1642 n.6 (2003) (highlighting that liability is only imposed on sports participant when he intentionally injures another player or acts recklessly).

<sup>162</sup> See generally Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 462 n.143 (1972) (noting that legislation banning dangerous activity that society will not tolerate is appropriate remedy).



## B. Defenses

### i. The Defense of Self Defense

The *Maki*<sup>163</sup> case involved a hockey player who hit an opposing player in the head with his stick during the course of a hockey fight which interrupted play.<sup>164</sup> Maki defended on the basis of self-defense, which was codified under Section thirty-four of the Ottawa Criminal Code.<sup>165</sup> This statute requires a Court to consider: 1) whether the accused was acting in self-defense, 2) the reasonableness of the force used under the circumstances, and 3) the state of mind of the accused.<sup>166</sup> The Court acquitted Maki finding that although he "fail[ed] to measure with nicety the degree of force necessary to ward off the attack and inflict[ed] serious injury thereby," nevertheless, the force used was not disproportionate.<sup>167</sup> Maki's acquittal on the defense of self-defense was based upon a subjective analysis of the perception of the accused rather than objective reality. The subjective analysis in self-defense is becoming increasingly common in state courts.<sup>168</sup> Traditionally, self-defense was only available to those who were objectively right in their actions.<sup>169</sup>

### ii. The Defense of Implied Consent

The doctrine of implied consent holds that one who knowingly and voluntarily engages in risky social intercourse consents to the risks inherent in the activity to which he has joined.<sup>170</sup> Implied consent is problematic for competitive contact sports because of the ambiguity involving the rules and practices of the game. Athletes may be expected to know the rules of the game; it is a tenuous stretch to impose complete knowledge of the

<sup>163</sup> *Regina v. Maki*, [1970] 14 D.L.R. (3d) 164, 164-65 (Ont. Prov. Ct. 1970).

<sup>164</sup> *See id.*

<sup>165</sup> *See id.* at 165.

<sup>166</sup> *See id.*

<sup>167</sup> *See id.* 166.

<sup>168</sup> *See id.* at 167 (stating "each case must be decided on its own facts").

<sup>169</sup> *See* B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 DUKE J. COMP. & INT'L L. 169, 172 (1991) (listing traditional objective elements of self-defense).

<sup>170</sup> The doctrine of implied consent in criminal law closely equates to the doctrine of assumption of risk in the law of torts only the mental state required for a crime requires a much greater degree of culpability as measured by the risk and gravity of potential harm.

practices of the game as well on athletes especially those athletes not playing at the highest levels or who are relatively new to the game. Further, although the rules are objective there is a subjective element to applying the rules of the game. For example, in the NFL, tackling a player by grabbing his face mask, running into the punter, or tackling a quarterback after he has thrown a pass is prohibited, but there is flagrant and incidental contact version of each of these penalties.<sup>171</sup> In short it is not easy to identify with certainty inherent risks in the game and the class of acts to which one actually consents or is permitted to consent.

Regardless of ambiguity in drawing the boundaries of implied consent, the law places limits as to what may tolerated by either actual or implicit consent. The general rule in Anglo-American law is that one can not give consent to having grievous bodily harm or death inducing harm inflicted on his or her person.<sup>172</sup> Thus consent is only a defense to simple assault, not to aggravated assaults leading to grievous bodily injury or death. The application of this law is somewhat restrained in competitive contact sports where promotion of the inherent values of sport permit a greater degree of consensual harm to be inflicted.<sup>173</sup> An established sports organization with proper equipment and rules promoting safety provides serves just such a public interest in sanctioning competitive contact sports.<sup>174</sup>

There are three problems with positing the doctrine of implied consent as the death knell for criminal liability in competitive contact sport. First, in an athletic contest, consent is not expressly given and implied consent is imprecise. Second, even if consent were expressly given in some binding contractual

<sup>171</sup> See NFL.com, Digest of Rules, <http://www.nfl.com/fans/rules> (last visited Feb. 20, 2007).

<sup>172</sup> See Kimberly A. Harris, *Death at First Bite: A Mens Rea Approach in Determining Criminal Liability for Intentional HIV Transmission*, 35 ARIZ. L. REV. 237, 248 (1993) (noting Model Penal Code does not allow consent as defense in cases of serious bodily harm).

<sup>173</sup> See *id.* at 248 n.104 (stating Model Penal Code permits "consent as a defense to serious bodily injury only where such injury is a 'reasonably foreseeable hazard' of participation in sports or athletic contests").

<sup>174</sup> Given the entertainment value of competitive contact sports, legislators generally appear more than lax in protecting athletes, but can be spurred to action after highly publicized instances of grievous bodily harm or death occurs during play. Boxing is a good example where congressional hearings spurred reform in the sports major sanctioning bodies.

way, the scope of the consent can not be determined since some aspects of play are implicit. Third, there is no real definitive way for an athlete to limit implied consent or opt out other than by restricting play or giving up the game entirely.

In his *Maki* opinion, Judge Carter opined that had not the defense of self defense been available, the defense of consent would have failed.<sup>175</sup> Judge Carter stated:

Although no criminal charges have been laid in the past pertaining to athletic events in this country, I can see no reason why they could not be in the future where the circumstances warrant and the relevant authorities deem it advisable to do so. No sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution.<sup>176</sup>

In support of this position, Judge Carter quoted Judge Stephens in *Regina v. Coney*,<sup>177</sup> who said:

In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence [sic] to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question of whether consent does or does not take from the application or force to another illegal character, is a question of degree depending upon circumstances.

... [T]here is a question of degree involved, and no athlete should be presumed to accept malicious, unprovoked or overly violent attack.

But a little reflection will establish that some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance. But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is

<sup>175</sup> See *Regina v. Maki*, [1970] 14 D.L.R. (3d) 164, 167 (Ont. Prov. Ct. 1970).

<sup>176</sup> *Id.*

<sup>177</sup> [1882] 8 Q.B.D. 534, 549.

provocation and in the heat of the game, should not fall within the scope of implied consent.<sup>178</sup>

What seemed clear to Judge Carter in *Maki* seemed just the opposite to Judge Fitzpatrick in the *Green* case. Green defended on grounds of consent.<sup>179</sup> Section 230 of the Criminal Code as then written stated that: "A person commits an assault when, without the consent of another person . . . (a) he applies force intentionally to the person of the other, directly or indirectly."<sup>180</sup> Judge Fitzpatrick essentially took judicial notice that:

[T]he players who enter the hockey arena consent to a great number of assaults on their person, because the game of hockey as it is played in the National Hockey League . . . could not possibly be played at the speed at which it is played and with the force and vigor with which it is played, and with the competition that enters into it, unless there was a great number of what would in normal circumstances be called assaults, but which are not heard of. No hockey player enters on to the ice of the National Hockey League without consenting to and without knowledge of the possibility that he is going to be hit in one of many ways once he is on that ice.<sup>181</sup>

So where do you draw the line? Judge Fitzpatrick gave players wide latitude reasoning that:

It is very difficult . . . for a player who is playing hockey with all the force, vigour and strength at his command, who is engaged in the rough and tumble of the game, very often in a rough situation in the corner of the rink, suddenly to stop and say, "I must not do that. I must follow up on this because maybe it is an assault; maybe I am committing an assault."<sup>182</sup>

<sup>178</sup> *Maki*, [1970] 14 D.L.R. (3d) at 167.

<sup>179</sup> *Green*, [1970] 16 D.L.R. (3d) at 137-41 (discussing the fact that Green, a member of the Boston Bruins, struck Maki, a member of the St. Louis Blues, in the head which was followed up by a life-threatening blow by Maki to Green's head during an exhibition hockey game in Ottawa, Canada 1969).

<sup>180</sup> *Id.* at 140.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 141.

Judge Fitzpatrick found credible Green's assertion that the fracas started when Maki grabbed Green's sweater.<sup>183</sup> He further found that Green retaliated against Maki only after Maki speared him in the groin area.<sup>184</sup> Judge Fitzpatrick stated that Maki did not remember spearing Green, but did testify that if he had speared Green he would expect that Green would immediately retaliate.<sup>185</sup> Judge Carter found Green to be the initial aggressor in acquitting Maki; Judge Fitzpatrick found Maki to be the aggressor in acquitting Green.<sup>186</sup>

### iii. The Defense of Involuntary Reflex

The only reported case testing involuntary reflex as a defense is *State v. Forbes*.<sup>187</sup> This case involved two ice hockey players who were both penalized by game officials. After coming out of the penalty box, Dave Forbes beat Henry Foucha, an opposing player until he suffered a fractured eye socket and required twenty-five stitches to close facial cuts.<sup>188</sup> Local police charged Forbes with aggravated assault by use of a dangerous weapon.<sup>189</sup> At trial, Forbes raised the defense of involuntary reflex.<sup>190</sup> The basis of this defense was that as an ice hockey

<sup>183</sup> See *Green*, [1970] 16 D.L.R. (3d) at 141-42 (noting that Green, an experienced and respected player, was in the best position to know whether Maki grabbed him by the sweater).

<sup>184</sup> See *id.* at 142 (finding that Green, after being speared by Maki in the groin, struck Maki with a "half-chop" on the shoulder, warning Maki as a measure of self-defense).

<sup>185</sup> See *id.* (stating that Maki initiated the fracas by way of the spearing to the groin area).

<sup>186</sup> See *Maki*, 14 D.L.R. (3d) at 166 (dismissing Maki's charge for not being able to find that Maki intended to injure Green beyond a reasonable doubt); see also *Green*, 16 D.L.R. (3d) at 143 (explaining that, although the initial blow was the half-chop by Green to Maki, the actual cause of the fight Maki's spearing of Green and thus Green's motion was instinctive, discharged as a protective measure).

<sup>187</sup> *State v. Forbes*, No. 63280 (Hennepin Co. Minn. Dist. Ct. dismissed Aug. 12, 1975).

<sup>188</sup> See C. Antoinette Clarke, *Article: Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149, 1179 n.199 (2000) (explaining how the butt end of Dave Forbes' hockey stick collided with Henry Boucha's eye causing permanent damage); see also Walter Kuhlman, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, n.7 (1975).

<sup>189</sup> See Clarke, *supra* note 182, at 1179 (describing charges as "aggravated assault by use of a dangerous weapon."); see also *Forbes*, *supra* note 181 (stating the charges as "Aggravated Assault, [pursuant to] Section 609.225, Subd. 2, Minnesota Statutes 1974.").

<sup>190</sup> See Clarke, *supra* note 182, at 1179-80 (noting "jurors voting to acquit were convinced that the social forces at work in the hockey community-acceptance of violence and fighting-made the attack part of the game."); see also Yates & Gillespie, *supra* note 81, at 166-67 (2002) (discussion how in Forbes defendant argued "violence in sports starts

players are trained from a very early age to use violence as part of the game strategy, such violence when used is an instinctive reflex lacking the necessary *mens rea* for a criminal assault.<sup>191</sup> The jury hung nine to three (9-3) to convict and the court declared a mistrial.<sup>192</sup> The prosecutor did not re-try the case.

Involuntary reflex is a defense because it is a non-act. The common law required proof of an *actus reus* or "criminal act" as the first predicate for the imposition of criminal liability.<sup>193</sup> *Actus reus* is a legal term of art. The classic definition of *actus reus* is that it is a controlled movement, that is, a willed movement.<sup>194</sup> Control requires a human mental process necessary to activate willed muscular movement, more specifically, an intentional act.<sup>195</sup> The fundamental predicate for the imposition of criminal liability is the *actus reus*, which is the criminal act.<sup>196</sup> The theoretical significance for assigning this important role to the *actus reus* owes to the assumption that an

at an early age and that the emotional nature of sports often induces players to lose control.").

<sup>191</sup> See Yates & Gillespie, *supra* note 81, at 166 (explaining involuntary reflex doctrine).

<sup>192</sup> See Kuhlman, *supra* note 182, at 772 n.10 (noting mistrial declared in Forbes due to a hung jury); see also Clarke, *supra* note 182, at 1180.

<sup>193</sup> See U.S. v. Parks, 411 F. Supp. 2d 846, 855 (S.D. Ohio 2005) ("An *actus reus* is defined as 'a wrongful deed which renders the actor criminally liable if combined with *mens rea*.'" (citing BLACK'S LAW DICTIONARY 36 (6th ed. 1990)) (italics in original); see also ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 605 n.1 (3d ed. 1989) ("It is beyond contradiction that, regardless how heinous, no man can be convicted for having criminal intent alone. An *actus reus* is essential.") (citing State v. Otto, 629 P.2d 646, 647 (1981)) (italics in original).

<sup>194</sup> See PERKINS & BOYCE, *supra* note 187, at 606 n.2 (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 54 (Boston: Little, Brown and Co.) (1881)) (illustrating Holmes' conception that an act is limited to the external manifestation of the actor's will, i.e., the muscular contraction of "crooking" one's finger and that it is the surrounding circumstances, i.e., "a pistol loaded and cocked, and of a human being in such a relation to [the pistol] to be manifestly likely to be hit, that make the act wrong."); see also *id.* at 608 (noting that muscular control necessary to speak may be sufficient to constitute an act) (citing MODEL PENAL CODE § 211.3 Terroristic Threat Provision which provides for criminal liability if a person "threatens to commit any crime of violence with purpose to terrorize another").

<sup>195</sup> See RESTATEMENT (SECOND) OF TORTS § 2 cmt. a (1965) (stating "[t]here cannot be an act without volition. . . . some outward manifestation of the defendant's will is necessary to the existence of an act which can subject him to liability"); see also HOLMES, *supra* note 188, at 54. Holmes notes that:

An act, it is true, imports intention in a certain sense. It is a muscular contraction, and something more. A spasm is not an act. The contraction of the muscles must be willed. And as an adult who is master of himself foresees with mysterious accuracy the outward adjustment which will follow his inward effort, that adjustment may be said to be intended. *Id.*

<sup>196</sup> See *supra* note 187.

act expresses the evil intent which the actor comes by on his or her own free will. Thus utilizing *actus reus* as the first predicate for assigning criminal liability serves the purpose of defensible line drawing. In so doing, *actus reus* helps to preserve important societal goals, namely primacy of individual liberty, by minimizing arbitrary and capricious assessments of criminality.<sup>197</sup> Defining the *actus reus* in terms of a willed movement, underscores both the theoretical and evidentiary significance of the term. Because of its corporeal nature, the *actus reus* serves an evidentiary role to demonstrate criminal intent.<sup>198</sup> By providing concrete evidence of an intent to cause harm, or, in the alternative, by giving concrete expression to evil intent, the *actus reus* serves as a non-arbitrary marker between criminal and non-criminal behavior as well as between evil thought and evil action.<sup>199</sup> Given the serious nature of the criminal stigma and sanctions, line drawing in this arena should be clear, definitive, and consistent. Non-arbitrary line drawing in law, *i.e.*, the task of separating law abiding citizens from those held liable under the law is more critical in criminal law than in intentional torts where the only consequence is the assignment of financial responsibility for individual harm.

There is a difference between a reflex and "instinctive behavior." The distinction is important since in the case of instinct, the mind has grasped the situation and intentionally

<sup>197</sup> Crimes which have a questionable *actus reus* component such as inchoate crimes, possession crimes, and status crimes can lead to questionable convictions. This is evident as where an alcoholic, unable to resist excessive consumption, satisfies the *actus reus* of appearing in a public place notwithstanding being without the necessary volition. See *Powell v. Texas*, 392 U.S. 514, 567-68 (1968) (Fortas, J., dissenting) (citing to *Robinson v. California*, 370 U.S. 660 (1962)). In *Powell*, the Supreme Court approved a Texas law, which made being drunk in public a criminal offense. See *Powell*, 392 U.S. at 532, 535. The Court argued that "in public" was adequate as an *actus reus*. See *id.* In *Robinson*, however, the Court disapproved of a California statute which made being a drug addict a criminal offense. See *Robinson*, 370 U.S. at 667. The Court in *Robinson* argued that the California statute lacked an *actus reus* because a person could become an addict through birth or forced consumption or could become an addict by virtue of acts in another state, for which California would have no jurisdiction. See *id.*

<sup>198</sup> See RESTATEMENT (SECOND) OF TORTS § 2 *supra* note 189 (noting criminal liability must be predicated on defendant's outward manifestation of his will as evidenced by some act's existence); see also HOLMES, *supra* note 188, at 54 (explaining that willed muscular movement is intent's external manifestation).

<sup>199</sup> See sources cited *supra* note 187. Cf. Michael D. Paley, Note: *Prosecuting Failed Attempts to Fix Prices as Violations of the Mail and Wire Fraud Statutes: Elliot Ness is Back!*, 73 WASH. U. L.Q. 333, 345 (1995) (discussing necessity of *actus reus* element to draw line between criminal and non-criminal activity).

dictated a course of action, whereas neural stimulants causing reflexive behavior provide no basis for criminal intent.<sup>200</sup> Once the defense is properly understood, it is highly questionable whether training to create a “learned response” might satisfy this requirement of involuntary action as a defense. Thus the *Forbes* case, like *Maki* and *Green*, reflects a resistance to applying the criminal law to competitive contact sports in a straightforward manner more than anything else.<sup>201</sup>

### III. FASHIONING A SPORTS BATTERY

#### A. Defining a Sports Mens Rea

##### i. Mens Rea: The Guilty Mind

Moral culpability is what primarily distinguishes a crime from an intentional tort or an intentional breach of a contractual duty. The notion that the criminal law is concerned with the subjective mind manifested in a physical act or harmful result is an advance in the common law, which owes to the influence of canon law during the middle ages.<sup>202</sup> Under the influence of canon law, the concept of criminality required not only physical acts or harmful results, but also the concurrence of the guilty or immoral mind with physical acts or harmful results.<sup>203</sup> Discernment of the guilty mind and defining crimes so that

<sup>200</sup> See 1 W. LaFare & A. Scott, *CRIMINAL LAW* 4TH ED., § 3.2 at 199 (and cases cited therein). Thus tort liability, concerned primarily with cost burdens, could be imposed on the basis of mere reflex, but not criminal liability. See *RESTATEMENT (SECOND) OF TORTS* §2 cmt. a (1965) (characterizing reflexive behavior as including “knee-jerk[s] or the blinking of the eyelids . . . or the convulsive movements of an epileptic . . . [or] movements of the body during sleep”).

<sup>201</sup> See generally *State v. Forbes*, No. 63280 (Hennepin Co. Minn. Dist. Ct. dismissed Aug. 12, 1975) (reflecting resistance to applying criminal law to competitive contact sports).

<sup>202</sup> See Bruce R. Bryan, *The Battle Between Mens Rea and the Public Welfare: United States v. Laughlin Finds a Middle Ground*, 6 *FORDHAM ENVTL. L.J.* 157, 162-63 (1995) (discussing how melding of Roman and Canonical laws during Middle Ages birthed concept actor's intent giving “moral significance to the act, thereby determining culpability[,]” which has led to continual recognition of *mens rea* requirement as “time-honored principal of criminal jurisprudence.”).

<sup>203</sup> See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 *UTAH L. REV.* 635, 654-55 (1993) (noting impact canon law had on development of criminal law and that “Saint Augustine was apparently the first to employ the term *mens rea* to capture the notion that the moral content of behavior cannot be assessed without attention to inner states”).



criminal elements, if proven accurately demonstrate non-arbitrary evidence of a criminal mind beyond a reasonable doubt is a major goal of the criminal law.<sup>204</sup>

Proving an intangible thing such as a "guilty mind" is easier said than done, especially where the standard of proof is proof beyond a reasonable doubt. Perhaps the day will come when the advance of science and technology or some other approach will allow for the discernment of thought patterns with certitude. For now, we must rely on circumstantial evidence.

Circumstantial evidence can, and undoubtedly does, mean differing things to different people. Reasonable doubt means a doubt based upon reason—objective, logic-based reasoning, not groundless speculation or, worse yet, ideologically based reasoning reflecting political tribalism.<sup>205</sup> Even so, in a heterogeneous society the standard of objective, logic-based reasoning can never really be more than intelligence guided by the experiences of each individual juror. People with differing experiences applying the same objective rule of law will single out different phenomena as constituting facts and will impregnate those facts with differing categories of importance. Hence the traditional goal of criminal law is not only to define moral culpability, but to employ terminology that to the greatest extent possible, minimizes the potential for interjecting bias and prejudice into the evaluation of the defendant's mind set so as to achieve consistent results.<sup>206</sup> Once a criminal definition or term is recognized as being ambiguous it must give way to more precise terminology. Thus one important aim of traditional criminal law is to reduce or eliminate the potential for untoward

<sup>204</sup> See William A. Tilleman II, *It's a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offenses Towards a New Classification Scheme*, 16 AM. J. CRIM. L. 279, 289 (1989) (stating, "[t]o be convicted of a true criminal offense, the prosecutor must convince the judge, beyond a reasonable doubt, that the accused had a guilty mind[,] and noted that the U.S. Supreme Court has stated that "existence of a mens rea is the rule . . . rather than the exception" in criminal law).

<sup>205</sup> See Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 101 (1996) (discussing meaning of reasonable doubt, stating that it "means a doubt based upon reason" and that it should be objective and logic-based, rather than based on speculation or "political simpatico").

<sup>206</sup> See Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 393-94 (1988) (recognizing uniqueness of criminal law in that it only allows courts to impose sanctions when a defendant has violated a precise and unambiguous written rule, which assures that legislative branch decides what conduct should be criminal and limits the potential for abuse of discretion).

human discretion in defining or applying legal terms, since such discretion could be used as a tool of oppressive political bias, which does no credit to criminal jurisprudence and the trial process.<sup>207</sup> This is especially so in the highly partisan world of sports. Historically, the criminal law pursued the goal of precision even as societal mores changed with respect to crime and punishment,<sup>208</sup> and even as litigation gamesmanship altered the balances intended by rules of substance and procedure. Because the socio-economic and political matrix is ever changing, grounding a sports *mens rea* consistent with the fundamental principles of criminal law is absolutely critical to its application.

*Mens rea* is a legal term of art, which refers to the cognitive mental component of crime.<sup>209</sup> Reflecting differing historical traditions, *mens rea* is impregnated with a repository of nuances of meaning. First, due to the influence of canon courts and religious based scholarship, *mens rea* or *scienter*<sup>210</sup> referred to the evilness or “actual wickedness”<sup>211</sup> of the actor. For example, a person who harms another without excuse or justification, exhibits moral depravity which constituted the *mens rea* element. However, morally laden terms were subject to wide variations in interpretation as inconsistent jury results often made clear.<sup>212</sup>

<sup>207</sup> See Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1281 (1998) (examining criminal law’s goal, noting that juries could be given freedom to make “finer appraisals of blameworthiness under more general standards,” or be given greater discretion to decide who to punish or deter, but this is not the case because the aim of criminal law is to punish only the individually blameworthy to make certain “that outcomes appear consistent and not the product of prejudice, sympathy, whim, or the art of jury selection, and to prevent false acquittals that reward favored defendants or finessed defenses from becoming the order of the day to the detriment of general deterrence goals and the respectability of criminal law itself.”).

<sup>208</sup> See *Powell v. Texas*, 392 U.S. 514, 535-36, (1968) (plurality opinion) (providing “doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.”).

<sup>209</sup> See 21 AM. JUR. 2D *Criminal Law* § 126 (2006) (explaining elements of a crime, *mens rea* being guilty mind that produces the act; the mental state which “expresses the intent necessary for a particular act to constitute a crime.”).

<sup>210</sup> *Scienter* denotes guilty knowledge. See *Morissette v. United States*, 342 U.S. 246, 252 (1952).

<sup>211</sup> See HOLMES, *supra* note 188, at 75 (discussing *mens rea* as being synonymous with “actual wickedness of the party”).

<sup>212</sup> See Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 842 (1992) (explaining term *mens rea* has such extensive verbiage relating to it that it has become a source of ambiguity and confusion in criminal law since there has been such great variety and disparity in its definition).

Because at early common law all felonies were subject to capital punishment, the common law judges seeking to avoid harsh results became quite creative in making distinctions in terms of moral culpability.<sup>213</sup> Their handiwork re-casts *mens rea* as a reference to the mental ability or capacity of the actor for forming either wicked or intentional acts.<sup>214</sup> Viewed as a matter of capacity, *mens rea* speaks to sophistication of thought. The codification of the common law crimes brought terms which were more amenable to precise definition. Thus a third meaning of *mens rea* refers to the intention or level of awareness that under the circumstances in which an actor acts, harm is likely to occur as a result of the contemplated action.<sup>215</sup> There are three levels of awareness relevant in evaluating the criminal mind: awareness as to the nature of the conduct,<sup>216</sup> awareness as to the nature of the harmful result, and awareness as to the existence of a law prohibiting the conduct.<sup>217</sup>

<sup>213</sup> See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 147-48 (1986) (commenting on differences between American common law and English common law and how beginning in 1794, states divided murder into separate offenses in order to limit death penalty's application to those where defendant is most morally culpable); see also Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 939 (2005) (discussing early English common law when almost all felonies were capital offenses, noting "courts adopted interpretive strategies that would mitigate, not exacerbate, the severity of the criminal sanctions that had been authorized by Parliament.").

<sup>214</sup> See Gardner, *supra* note 197, at 663 (proposing "*mens rea* as originally conceived constituted a normative judgment of subjective wickedness, requiring not simply that the;5074;5074 actor intend to commit the offense, but also that the offense be committed by a responsible moral agent for wicked purposes."); see also Edward G. Mascolo, *Uncharged-Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 CONN. B. J. 281, 294 (1993) (noting English common law emphasis on the mental element of crime requiring vicious or guilty mind because guilt arose from offending actor's wicked intent; "if an individual lacked the mental capacity to form the requisite evil intent, there could be no guilt.").

<sup>215</sup> See Gardner, *supra* note 197, at 697 (discussing Model Penal Code's codification of common law, where concept of *mens rea* as evil or wicked motive was abandoned for a more structured system, which "links criminal liability to proof that the defendant subjectively possessed a certain level of culpability" and the level entails "intentional action coupled with awareness of the criminal consequences of the action under the circumstances.").

<sup>216</sup> See *Poster 'N' Things, Ltd v. United States*, 511 U.S. 513, 524 (1994) (stating, conviction under Mail Order Drug Paraphernalia Control Act, 21 U.S.C. Section 857, requires proof that defendant knowingly made use of interstate conveyance as part of scheme to sell items he knew were likely to be used with illegal drugs; government need not prove specific knowledge that items are "drug paraphernalia" within statute's meaning).

<sup>217</sup> See *Staples v. United States*, 511 U.S. 600, 619 (1994) (finding conviction under National Firearms Act, 26 U.S.C. Section 5861, which criminalizes possession of unregistered "firearm," including a machinegun, which statute defines as a weapon that

In the context of American football, for example, to show criminality on the part of defensive tackle von Oelhoffen who undertook to bring down quarterback Palmer, the prosecution would need to show that von Oelhoffen knew or should have known of the criminal prohibition against causing grievous bodily injury or death; that von Oelhoffen purposefully or—as the obvious purpose appears to be a legitimate attempt to thwart the quarterback's efforts to pass—the more likely mental state is knowingly—applied his brute strength, amplified by his bulk weight, to bend the quarterback's lower leg against a knee joint (conduct); and that serious knee injury would likely occur, since a knee would buckle under such brute strength and weight (result).<sup>218</sup> The negation of purpose or knowledge as to the law, conduct, or result would negate the required mental element and render the crime of a sports battery incomplete. The argument that this dynamic, competitive, contact sport is too fast for thinking at any culpable state of awareness underestimates the comfort level that well-trained and highly skilled professional athletes ply their trade. As Cincinnati Bengal rookie cornerback Jonathan Joseph offered, “[t]here are some rules that you just automatically know you can’t [break]. But the other knick-knack rules, you just can’t think about those, because it will slow you down. And that’s all within a second or two of getting a sack.”<sup>219</sup> It seems doubtful that players would be confused about the extreme cases that would be so uniformly condemnable as to garner widespread support for criminal prohibition.

## ii. Formulation of *Mens Rea* Concepts at Common Law

General intent crimes refer to intentional acts done with sufficient moral culpability to warrant criminal sanctioning.<sup>220</sup>

automatically fires more than one shot with a single pull of the trigger, requires proof that defendant knew his rifle had characteristics that brought it within statutory definition of machinegun).

<sup>218</sup> See generally *Poster ‘N’ Things*, 511 U.S. 513 (asserting it is necessary to prove defendant was aware as to conduct’s nature); *Staples*, 511 U.S. at 619 (stating that it was necessary to prove defendant was aware of existence of law prohibiting his conduct; in this case, awareness that his gun possessed characteristics that would bring him within statute’s scope).

<sup>219</sup> Kevin Kelly, *Roughing Rules Not Easy On Defense*, CINCINNATI ENQUIRER, Oct. 18, 2006 at C1.

<sup>220</sup> See Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 688 (2006) (finding “general

Here, moral culpability may be viewed as expressive of moral or religious ethos or perhaps more neutrally in terms of societal norms. The notion of generalized harm is beautifully expressed in poetry:

I shot an arrow into the air,  
It fell to earth, I knew not where;  
For, so swiftly it flew, the sight  
Could not follow it in its flight.<sup>221</sup>

Though the archer does not intend to injure with the shot into the air, should the arrow strike a person, the archer would be liable for a general intent crime. The arrow in flight is essentially a general harm waiting for the world to unwittingly produce the unintended victim. In the context of American football, one who hurls himself entirely out of control at another to make a tackle would evidence general intent were it not for the field of play. Of course hurling oneself at the opponent to make a tackle is often times the very essence of the sport and the players wear protective gear. The exception is spearing or leading with the helmet. Basing a sports battery on general intent would clearly undermine the very essence of competitive contact sports. This result is not warranted since serious injury seldom occurs with the vast majority of contact in competitive contact sports.

Specific intent crimes, like general intent crimes, are intentional acts done with sufficient moral culpability to warrant criminal sanctioning, but in addition, specific intent means the act is not only morally culpable, but is done with the objective of accomplishing the particular harmful result to the particular victim in the particular way in which the harm occurred.<sup>222</sup> Because of the added moral turpitude, capacity for thought, or

intent' meant that the crime required a mens rea in the culpability sense of a blameworthy state of mind.").

<sup>221</sup> HENRY WADSWORTH LONGFELLOW, *The Arrow and the Song*, in THE COMPLETE POETICAL WORKS OF HENRY WADSWORTH LONGFELLOW 68 (H.E. Scudder, ed., Boston: Houghton Mifflin Co. 1922), available at <http://www.gutenberg.org/dirs/1/3/6/1365/1365.txt>.

<sup>222</sup> See Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse*, 64 MO. L. REV. 383, 405 (1999) (guiding specific intent requires "prosecution must prove not only that the accused did certain acts, but that the accused accomplished the acts with the intent to cause a particular result."); see also Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1121, 1122 (2004) (defining specific intent crime one requiring defendant to commit prohibited action with some further purpose, beyond purpose to complete prohibited act; one who acts with specific intention possesses desire that her actions will result in particular state of affairs).

sophistication of thought required to form and act on a specific intent, specific intent is the appropriate level of *mens rea* to definitively set a sport's battery apart from all but extreme cases of competitive contact resulting in serious injury or death.<sup>223</sup>

### iii. The Model Penal Code Formulation of *Mens Rea*

In an attempt to replace moral ambiguity with more rationally laden terms,<sup>224</sup> the model penal code's [hereinafter MPC] formulation of *mens rea* concepts provide for greater differentiation of mental states.<sup>225</sup> The MPC formulation replaces terms such as general intent and specific intent with a hierarchy of four mental states.<sup>226</sup>

#### MPC Section 2.02 General Requirements of Culpability

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) *Purposely*.

A person acts purposely with respect to a material element of an offense when:

<sup>223</sup> Diane V. White, Note, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1048 (1986) (discussing sports violence and law that Canada has enforced, noting Canadian courts have recognized "emotional intensity awakened during play may justify conduct that would not be acceptable in calmer situations").

<sup>224</sup> The drafters provide examples such as general criminal intent, *mens rea*, malice, willfulness, and scienter. See MODEL PENAL CODE § 2.02 cmt. at 1 (1985).

<sup>225</sup> See Hong, *supra* note 154, at 5 (noting Model Penal Code lists four distinct levels of *mens rea* ranging from greater to less culpable, allowing for differentiation); see also Miguel Angel Mendez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 436 (1995) (stating Model Penal Code provisions went long way toward resolving some of definitional uncertainties by redefining *mens rea* into discrete mental states).

<sup>226</sup> See MODEL PENAL CODE § 2.02 (1962) (setting out purposely, knowingly, recklessly, and negligently as the code's four culpable mental states).

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) *Knowingly*.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) *Recklessly*.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently*.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and

purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>227</sup>

The MPC formulation indicates a shift from terms that describe a moral element of *mens rea* to terms that describe the defendant's level of awareness. The MPC definition of "purpose" corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent.<sup>228</sup> Yet some ambiguity remains in the terms "knowledge" and "recklessness."<sup>229</sup> Some courts have construed both terms to evidence a general intent,<sup>230</sup> while still others have interpreted both to satisfy specific intent requirements.<sup>231</sup>

#### iv. Selecting a Workable *Mens Rea* for a Sports Battery

The Restatement of Torts suggests that assault and battery is the most likely civil claim arising out of sports.<sup>232</sup> If read broadly, each state has a battery provision in which

<sup>227</sup> *Id.*

<sup>228</sup> *U.S. v. Bailey*, 444 U.S. 394, 405 (1985) (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §28 at 201-02 (1972)).

<sup>229</sup> *See id.* at 404 (discussing important distinctions between mental states of purpose and knowledge, but failing to discuss reckless and negligent in the same way).

<sup>230</sup> *See Bailey*, 444 U.S. at 405 (noting knowledge corresponds to common law concept of general intent (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 28, at 201-02 (1972))); *Watson v. Dugger*, 945 F.2d 367, 370 (11th Cir. 1991) (stating "general intent crimes . . . require some showing of culpability, either knowing, reckless, or negligent, rather than intentional, action.") (citing P. LOWE, J. JEFFRIES, JR., & R. BOONE, CRIMINAL LAW: CASES AND MATERIALS 232 (1982)); *Gasser v. Morgan*, 498 F. Supp. 1154, 1163 (N.D. Ala. 1980) (positing "general intent" means . . . 'recklessly doing the physical act which the crime requires") (quoting W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §45 at 343-44 (1972)).

<sup>231</sup> *See U.S. v. Boyer*, 694 F.2d 58, 59 (3d Cir. 1982) (affirming "specific intent to deceive may be found from a material misstatement of fact made with reckless disregard of the facts"); *U.S. v. Barclay*, 560 F.2d 812, 815 n.2 (7th Cir. 1977) (explaining specific intent is satisfied if it can be established defendant knowingly committed act forbidden by law, or knowingly failed to act where law requires action (quoting La Buy Section 4.04 33 F.R.D. at 550-51)).

<sup>232</sup> The Restatement defines battery as harmful or offensive contact with another person stemming from intent to make such contact or create imminent apprehension of such contact. *See* RESTATEMENT (SECOND) OF TORTS § 18 (1965). The Restatement says that one is subject to liability for assault if they act intending to cause a harmful or offensive contact with the person of another, or an imminent apprehension of such contact, and such imminent apprehension results. *See* RESTATEMENT (SECOND) OF TORTS § 21 (1965). In contact sports, players continuously make "harmful" contact with their opponents, and this is almost always accompanied by an "imminent apprehension" on behalf of the one being hit, at least where he sees the hit coming. Therefore, it logically follows that battery and assault would be the most likely civil claims arising out of sports.



criminal thuggery masquerading as sport might fall, but actual criminal liability would depend on whether a court would apply the statute to sports. Iowa has a statutory provision, which creates a sports exception for assault when a person voluntarily participates in a sport and such act (assault) is a reasonably foreseeable incident of such a sport or activity and it does not create an unreasonable risk of serious injury or breach of peace.<sup>233</sup> Only Wisconsin, has a statute which specifically addresses the liability of contact sports participants in recreational activities in tort.<sup>234</sup> The Wisconsin statute provides for civil liability.<sup>235</sup> However, as civil battery differs from criminal battery only by the requisite state of mind in which the battering act occurs, the Wisconsin statute provides a useful starting point for analysis.

Liability of contact sports participants. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury. (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.<sup>236</sup>

As recognized in the statute's deference to a professional league that establishes a policy with a different standard, a call for a

<sup>233</sup> See I.C.A. § 708.1 (2004).

<sup>234</sup> See WIS. STAT. § 895.525 (4m) (2006) (creating potential civil liability for amateur sport participants who injure other participants during play and applying similar rules to professional sports unless the professional league "establishes a clear policy with a different standard").

<sup>235</sup> See *id.* (imposing civil liability upon sport participants who injure other participants during play, but only if they act recklessly or with intent to injure).

<sup>236</sup> *Id.*

criminal law of sports must be heard by the federal government given the interstate commercial character of sports leagues. Substituting purpose or knowing mental states for their civil analogs in tort law, the Wisconsin statute works for criminal purposes. The gravamen of such a sports battery offense is protection of athletic autonomy to play the game regardless of competitive sport intensity. Purpose identifies the mental state when players enter the field for the sole or primary reason or goal to cause grievous bodily injury or death to another without regard for any legitimate sporting objective. Knowing identifies the mental state when players seek to accomplish a legitimate sporting objective, but do so in a way that they know or should know will cause serious bodily injury or death to another player.

As previously argued the temptation to lower the criminally sanctionable mental state to criminal recklessness should be resisted. Players who come barreling in out of control may very well do so recklessly and in a perfect world, we might consider out-of-control tactics as sufficing to prove criminal recklessness. However concern that overzealous prosecution might chill legitimate competitive zeal cautions against crafting standards to catch any but the clearly worst offenders at the extreme end of misconduct. The rules of the game and the fostering of safe practices should be adequate to shield competitors from out-of-control tactics.

In the final analysis, the introduction is overdue of a federal sports battery statute precisely limited to situations in which purposeful or knowing criminal misconduct during play leads to grievous bodily injury or death. Whether the criminal misconduct occurs during play or out of play should not be a conceptual barrier as long as a prosecutor can demonstrate a criminal mind.

### *B. Proving a Sports Mens Rea*

The second great task after defining mens rea is proving a *mens rea* by reference to, and inference from, harm causing conduct. The task is to set out knowable objective principles to prescribe the actions causing death or serious injury. The best

way to start is with examples of criminal thuggery masquerading as legitimate sport.

i. Spoken Intent

a. Sending a Message as Motive

During the Athletic 10 Conference Basketball Tournament Play in February 2005, NCAA Men's Basketball Hall of Fame Coach John Chaney, while coaching at Temple University, put in seldom used 6-foot-8, 250 pound Nehemiah Ingram, a self-described, "goon" to "send a message" by delivering hard fouls against Saint Joseph's University.<sup>237</sup> Chaney was angry at what he thought were illegal screens by the opposition team.<sup>238</sup> Ingram responded by fouling out in four minutes, but not before thwarting a lay-up attempt by John Bryant with a hard elbow that sent Bryant crashing to the floor, breaking his arm and ending his season.<sup>239</sup> The referee actually allowed Ingram to continue play until he accumulated five fouls necessary to compel a player's exit from the game. The referee

<sup>237</sup> See ESPN.com, *Longtime Temple Coach Chaney Retires*, Mar. 13, 2006, <http://sports.espn.go.com/ncb/news/story?id=2366357> (reporting that coach Chaney inserted "goon" Nehemiah Ingram into game in order to commit hard fouls); Phil Taylor, *The Blame Game: Administrators Shouldn't be Silent in Chaney Saga*, Mar. 2, 2005, [http://sportsillustrated.cnn.com/2005/writers/phil\\_taylor/03/02/chaney/index.html](http://sportsillustrated.cnn.com/2005/writers/phil_taylor/03/02/chaney/index.html) (describing how Chaney sent Ingram in to even score by committing hard fouls); ESPN.com, *Chaney Sent Player in to Foul*, Feb. 28, 2005, <http://sports.espn.go.com/ncb/news/story?id=1999665> (stating that Chaney put Ingram in game to "send a message"); *Can't Stop the Bleeding, Chaney Melts Down, Suspends Self*, Feb. 24, 2005, <http://www.cantstopthebleeding.com/?p=1148> Feb. 24, 2005 (explaining how Chaney sent in Nehemiah Ingram to provide some "rough justice" and quoting Chaney as saying, "I'm sending a message . . . And I'm going to send in what we used to do years ago—send in the goons.").

<sup>238</sup> See *Longtime Temple Coach Chaney Retires*, *supra* note 231 (reporting that Chaney decided to send Ingram in "because he thought the Hawks were using illegal screens"); *Chaney Sent Player in to Foul*, *supra* note 231 (stating that Chaney sent Ingram in after becoming "angered by what he thought were illegal screens by Saint Joseph's").

<sup>239</sup> See *Longtime Temple Coach Chaney Retires*, *supra* note 231 (noting that John Bryant broke his arm after being knocked out of the air by Ingram); Taylor, *supra* note 231 (describing how "Ingram dutifully did what Chaney told him, elbowing one Owl in the head and sending another, senior John Bryant, flying on a layup attempt" and further explaining that "Bryant broke his arm on the landing, which sideline[d] him for the final games of his college career."); *Chaney Sent Player in to Foul*, *supra* note 231 (pronouncing "Ingram fouled forward John Bryant hard, sending him sprawling to the ground and breaking his arm."); see also *Can't Stop the Bleeding, Chaney Melts Down, Suspends Self*, *supra* note 231 (exclaiming "Ingram hit everything that moved and fouled out in 4 minutes").

awarded neither technical fouls nor otherwise acted to limit Ingram's harm producing behavior.<sup>240</sup> Coach Chaney apologized and suspended himself for the remainder of the season.<sup>241</sup> Temple University and the Athletic 10 Conference in which Temple University played, agreed with the suspension.<sup>242</sup> Other than the foul assessed by the referee, Nehemiah Ingraham received no administrative sanction because he was just following orders.<sup>243</sup> If the defense of just following orders is a defense at all, it is so only to the extent that the orders given are lawful and reasonable. John Bryant did not initiate legal proceedings in his own behalf. Ingraham's attacks masquerading as fouls were not reasonable and had they occurred off the court they would amply demonstrate intentional criminal misconduct.

#### b. Retaliation as Motive

In 1999, the ace pitcher for the Wichita State Shockers baseball team Ben Christiensen intentionally threw a pitch at lead off hitter Anthony Molina as he took warm up swings between innings.<sup>244</sup> It is an unwritten rule in baseball that a warm up batter should not "time-up" a pitcher by standing close to the plate during warm ups.<sup>245</sup> Molina was within 20 feet of home plate when he was hit in the eye.<sup>246</sup> As a result of being hit by the pitch Molina suffered broken facial bones and permanently damaged vision.<sup>247</sup> The Wichita State pitching

<sup>240</sup> *Contra Can't Stop the Bleeding, Chaney Melts Down, Suspends Self*, *supra* note 231.

<sup>241</sup> *But see* Taylor, *supra* note 231 (illustrating how Chaney apologized and imposed suspension upon himself, which university later extended after Bryant's fracture was revealed); *Chaney Sent Player in to Foul*, *supra* note 231 (reporting that Chaney apologized and suspended himself for one game, but was suspended for rest of season by the university).

<sup>242</sup> *See Chaney Sent Player in to Foul*, *supra* note 231 (claiming that Temple's president announced suspension and Atlantic ten Conference supported the president's decision and refused to impose further sanctions).

<sup>243</sup> *See id* (explaining that although Saint Joseph's wanted conference to punish Ingram, officials refused to do so stating, "[b]ecause Nehemiah was instructed to commit the hard fouls, we found fault with coach Chaney, not Nehemiah").

<sup>244</sup> *See* Carol Slezak, *Molina Still Isn't in Celebratory Mood*, CHICAGO SUN-TIMES, May 11, 2004, available at [http://www.findarticles.com/p/articles/mi\\_qn4155/is\\_20040511/ai\\_n12547507](http://www.findarticles.com/p/articles/mi_qn4155/is_20040511/ai_n12547507) (depicting the events the incident); *see also* Jim Callis, *Molina Settles with Christensen*, Feb. 5, 2002, <http://www.baseballamerica.com/today/news/020205christensen.html> (describing the beaming incident).

<sup>245</sup> *See* Callis, *supra* note 243; *see also* Slezak, *supra* note 243.

<sup>246</sup> *See* Callis, *supra* note 243; *see also* Slezak, *supra* note 243.

<sup>247</sup> *See* Callis, *supra* note 243; *see also* Slezak, *supra* note 243.

coach admitted that he coached his pitchers to brush back hitters in that situation.<sup>248</sup> In the vernacular, the pitching coach would tell the pitcher to “put it in his ear.” The beaning was clearly intentional and Molina at least filed a civil suit, which the parties settled out of court.<sup>249</sup> Christianson was a first round draft pick that year and signed for over \$1 million.<sup>250</sup>

New York Yankees pitcher Roger Clemens hurled not only fastballs, but intimidating brush back pitches as well as multiple insults at New York Mets catcher Mike Piazza in interleague play.<sup>251</sup> In the summer of 2000, Clemens hit Piazza in the head with a fastball; Piazza, felt the beaning was intentional.<sup>252</sup> In the 2000 World Series, Clemens threw part of a splintered broken bat at Piazza during one of Piazza’s at bats against Clemens.<sup>253</sup> But, because Clemens pitched in the American league, where the designated hitter rule allows pitchers to opt out of exposure at the plate, Piazza would have to wait until Clemens played an interleague series with the Mets to get his revenge. In 2002, Clemens pitched against the Mets at Shea Stadium and would be forced to bat.<sup>254</sup> The New York media interest was intense as to

<sup>248</sup> See Callis, *supra* note 243; see also Carl Bialik, *Don't You Dare Time My Pitches*, YALE HERALD, <http://www.yaleherald.com/archive/xxviii/1999.09.03/sports/p25bialik.html> (last visited Feb. 26, 2007) (pitching coach told Christensen to throw at Molina).

<sup>249</sup> See Bialik, *supra*, note 247; see also Callis, *supra* note 243.

<sup>250</sup> See Slezak, *supra* note 243.

<sup>251</sup> See Dave Anderson, *The Headliners of 2000: Big Money, a Broken Bat, and a Wonder Named Woods*, NY TIMES, Dec. 31, 2000, at 8-1 (reporting Clemens gave Piazza concussion by hitting him in the head with brush back pitch earlier in season and hurled splintered bat fragment in Piazza’s direction during World Series); Dan Barry, *Subway Series; A Big Fantasy Camp Suddenly Evaporates*, NY TIMES, Oct. 28, 2000, at D-1 (describing Clemens’ bat fragment throwing incident and earlier beaning incident).

<sup>252</sup> See Anderson, *supra* note 241 (asserting Clemens hit Piazza’s helmet with pitch during regular season); Barry, *supra* note 238 (explaining Piazza suffered concussion after being hit in head by Clemens pitch earlier in year); Jack Curry, *Piazza Hurt; Mets Furious*, NY TIMES, July 9, 2000, at 8-2 (stating “92-mile-an-hour fastball hit the NY on the front of Mike Piazza’s batting helmet, making an ugly sound and causing Piazza to tumble to the dirt like a mannequin. Piazza could not avoid Roger Clemens’s pitch, and he lay motionless.”); see also Tyler Kepner, *Hampton and the Mets Get Tough and Then Get Even; Groggy and Angry, Piazza Rips Clemens*, NY TIMES, July 10, 2000, at D-1 (referring to Clemens beaning incident and reporting that Piazza said, “I thought it was definitely intentional”).

<sup>253</sup> See Anderson, *supra* note 241 (describing how Clemens threw a piece of Piazza’s shattered bat in the batter’s direction near the first base line); Barry, *supra* note 238 (reporting Clemens received \$50,000 fine for fielding jagged piece of Piazza’s broken bat and tossing it in Piazza’s direction).

<sup>254</sup> See Rafael Hermoso, *Clemens is Hit, But it Isn’t With a Pitch*, NY TIMES, June 16, 2002, at 8-1 (recounting match up between Mets pitcher Shawn Estes and Roger Clemens during June 15, 2002 inter-league game between the Yankees and the Mets, Clemens’s first at-bat against the Mets since 2000 World Series).

whether Mets pitcher Shawn Estes would hit Clemens during his first at bat to avenge the beaning of Piazza. Fearing suspensions, the Mets locker room did not overtly state that Estes would hit Clemens. However, Mets GM Steve Phillips said the issue was “unresolved” making it clear that the Mets intended to follow the baseball tradition of retaliation.<sup>255</sup>

In Clemens’ first at bat, pitcher Estes threw the first pitch a foot behind Clemens, a pitch so far off its mark there was no doubt its intentions.<sup>256</sup> Estes was maligned not for attempting to bean Clemens, but instead for not hitting Clemens.<sup>257</sup> Former pitcher Rob Dibble stated that the Mets “sent a boy to do a man’s job,” and that “had [Estes] knocked down Clemens or hit him in the numbers, I wouldn’t have had to criticize him on SportsCenter and Baseball Tonight.”<sup>258</sup> Estes, many argued, should have made Clemens either eat dirt or the ball. Instead, Estes intentionally attempted to hit Clemens, but made sure that his attempt was wild.<sup>259</sup> The Ben Christensen incident and subsequent exposure to civil liability may have been a factor in Estes’ mind. This scenario provides an opportunity to make a worthwhile distinction. On the one hand, if Estes had beamed Clemens causing grievous bodily injury or death, the location of the pitch, the obligations of loyalty to a teammate, and media focus leading up to the confrontation, and most importantly baseball’s unwritten rule of retaliation, would have shown the calculated steps and *mens rea* necessary for a criminal prosecution. Attempting, but failing, to hit a player in the head with a hard fastball would arguably constitute an attempted sport battery as described herein. On the other hand, given Estes’ skill level and his obvious decision to scare, but not hit,

<sup>255</sup> See Rafael Hermoso, *The Subject is Clemens, But Piazza Won’t Bite*, NY TIMES, June 15, 2002, at D-3 (quoting Phillips as saying that Piazza-Clemens issue was “unresolved”).

<sup>256</sup> See ESPN.COM, *Mets Tag Clemens for Pair of Homers*, June 15, 2002, <http://espn.go.com/mlb/news/2002/0615/1395313.html> (reporting that Estes threw eighty-seven mph fastball behind Clemens).

<sup>257</sup> See *id.*

<sup>258</sup> See Craig Calcaterra, *Rob Dibble’s Dubious Code of Honor*, BULL MAG., June 22, 2002, <http://www.bullmag.com/view.php?ai=44> (quoting Dibble’s comments on Sports Center); see also Rob Dibble, *Estes Missed on Message*, June 19, 2002, <http://espn.go.com/talent/danpatrick/s/2002/0617/1395889.html> (responding to his own comments on Sports Center, and streaming video of Dibble’s comments).

<sup>259</sup> See *Mets Tag Clemens for Pair of Homers*, *supra* note 250 (stating pitch was extremely wild).

Clemens, the better argument is to forego a criminal charge. The argument is that Estes only intended to scare, but not hit Clemens.<sup>260</sup> A second argument is that a rush to criminal judgment on “wild” pitches overstates the ability to clearly draw the line between criminal and non-criminal misconduct. Afterall, is pitchers could always put the ball exactly where they intended, there would be fewer walks and home runs. The counter-argument is that a criminal charge, even if not carried through to fruition is the fastest way to end the dangerous tradition of brushbacks.

Nehemiah Ingram, Shawn Estes, and Ben Christiensen each purposely caused or attempted to cause grievous bodily injury risking death to accomplish a competitive objective.<sup>261</sup> Each did so within the confines of the rules and practices of the game. The rules and practices of the game seem imminently reasonable to sports-minded people. In competitive basketball, aggressive body contact impeding the sporting objective of an opponent is a violation of the rules. In any activity besides competitive contact sports, such as Christmas shopping, for example, in rushing to get the last available “must have” gift of the season, purposely elbowing a competitor to the floor would be grounds for criminal prosecution.<sup>262</sup> There is even less body contact in baseball than basketball; other than tagging a runner with the ball, the rules of the game do not call for contact at all. Yet in any activity besides competitive contact sports, throwing baseball sized objects at others would be considered criminal activity.<sup>263</sup> If there is clear evidence of purposeful or knowing

<sup>260</sup> See *id.*

<sup>261</sup> See Callis, *supra* note 243 (reporting Christianson's throw at Molina); *Mets Tag Clemens for Pair of Homers*, *supra* note 255 (reporting Estes beaming attempt); see also Bob Kovack, *Cheney, Temple and the A-10 All Drop the Ball*, <http://www.geoclan.com/sports/articles/05/ktakes/KovacksTakesSeason15.htm> (last visited Feb. 26, 2007) (reporting incident when Ingrahm broke another player's arm).

<sup>262</sup> See MSNBC.COM, *PlayStation 3 Debuts in US Amid Long Lines*, Nov. 17, 2006, <http://www.msnbc.msn.com/id/15754452/> (describing intense fighting in US debut of PlayStation three gaming system); see also Peter Svenson, *Violence Mars PlayStation 3 Launch*, USA TODAY, Nov. 18, 2006, available at [http://www.usatoday.com/tech/gaming/2006-11-18-ps3-violence\\_x.htm](http://www.usatoday.com/tech/gaming/2006-11-18-ps3-violence_x.htm) (describing violence that erupted during debut of PlayStation 3 videogame system).

<sup>263</sup> Chicago Cubs pitcher Jae-kuk Ryu aimed for and knocked an osprey from its perch, killing it with a baseball. See WORLDNETDAILY.COM, *Baseball: Wild(life) Pitch Under Investigation - Minor League Cubs Player Strikes Out At Osprey In Nest*, April 23, 2003, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=32207](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=32207). Officials with

intent, it is appropriate to proscribe the misconduct by initiating a charge of sports battery, or aggravated battery, or homicide depending upon the level of harm inflicted.

ii. Actions beyond the pale

Actions beyond the pale are those which are so far removed from the rules and practices of the game that there it was never thought necessary to prohibit the action.<sup>264</sup> Perhaps the best example, as well as the scariest incident in the history of the National Basketball Association occurred on December 9, 1977 between Rudy Tomjanovich of the Houston Rockets and Kermit Washington of the Los Angeles Lakers.<sup>265</sup> After a Houston basket, a slight tussle broke out among opposing players, which continued as the players ran to the opposite end of the court. Tomjanovich ran slightly behind Washington. As he approached, Washington suddenly turned and with arm fully extended, punched Tomjanovich in the face.<sup>266</sup> The injury nearly shattered his face leaving him in a pool of blood and nearly killing Tomjanovich.<sup>267</sup> The injury required five surgeries and ended Tomjanovich's playing career.<sup>268</sup> The NBA fined Washington \$10,000 and suspended him sixty days without pay.<sup>269</sup> This incident led to the NBA instituting a flagrant foul rule.<sup>270</sup> Of criminal response there was none; nor civil

the Florida Fish and Wildlife Conservation Commission sought criminal charges, noting that wounding or killing an osprey is a second-degree misdemeanor, punishable by a fine up to \$500 and 60 days in jail. *Id.* In 1983, New York Yankee star outfielder Dave Winfield also received public condemnation for throwing a baseball at a sea gull that hit and killed the bird while in Toronto. See WIKIPEDIA.ORG, [http://en.wikipedia.org/wiki/Dave\\_Winfield](http://en.wikipedia.org/wiki/Dave_Winfield) (last visited Feb. 28, 2007).

<sup>264</sup> Beyond the pale is an idiom that generally means to go beyond traditional rules or boundaries such that the action is unacceptable or unreasonable. See THEFREEDICTIONARY.COM, <http://www.thefreedictionary.com/pale> (last visited Feb. 28, 2007).

<sup>265</sup> See Brooks Marlin, *The Punch: Kermit Washington vs. Rudy Tomjanovich*, [http://everything2.com/index.pl?node\\_id=1376655](http://everything2.com/index.pl?node_id=1376655) (last visited Feb. 28, 2007) (depicting incident's events); see also David L. Moore, *New Start From Old Wounds*, Nov. 26, 2002, <http://www.usatoday.com/sports/ccovtue.htm> (discussing Kermit Washington's attack on Rudy Tomjanovich).

<sup>266</sup> See Marlin *supra* note 259; see also Moore, *supra* note 259.

<sup>267</sup> See Marlin *supra* note 259; see also Moore, *supra* note 259.

<sup>268</sup> See Marlin *supra* note 259; see also Moore, *supra* note 259.

<sup>269</sup> See Marlin *supra* note 259; see also Moore, *supra* note 259.

<sup>270</sup> The flagrant foul rule was instituted in the 90's. See WIKIPEDIA.COM, [http://en.wikipedia.org/wiki/Flagrant\\_foul](http://en.wikipedia.org/wiki/Flagrant_foul) (last visited Mar. 5, 2007). Most NBA rules



prosecution for that matter. The most interesting factoid about this incident is not its plainly deliberative nature, but that players who engaged in such criminal conduct were well known as “the enforcers.”<sup>271</sup> Where there is clear evidence of purposeful or knowing intent such as punching an opponent in the face on the return up court away from the ball, it is appropriate to proscribe the misconduct by initiating a criminal charge of sports battery or aggravated battery or homicide depending upon the level of harm inflicted.

### CONCLUSION

Competitive contact sport injuries can be, and often are, serious. Statistically, major injuries are inevitable due to excessive risk inherent in competitive contact sports. But at the end of the day, athletes generally expect to walk away from the field of sport in substantially the same condition as when they walked on the field of play. Purposeful or knowing strategic acts to cause grievous bodily injury for a competitive advantage is a different matter. Surely the criminal law applies to on-field misconduct the same as off-field misconduct. The English Rule looks to evaluate *mens rea* but allows a high presumption of innocence for players acting within the rules and custom of the game. Under the American Rule players consent to risks inherent in the rules and custom of the game and so long as the rules are reasonable, there is no criminal liability for accidents, and injury is excused. Neither legal tradition nor the rules of the games adequately address strategic acts of criminal thuggery masquerading as legitimate sport. The contemporary incidents reviewed in this article should spur thoughts toward developing a criminal jurisprudence to address intentional or reckless actions causing grievous bodily injury on the playing field. The goal of *lex sportiva* is that no athlete should have to suffer purposeful or

about fighting grew out of this incident according to Moore and Marlin articles above, but not the flagrant foul rule, which has nothing to do with fighting, but hard fouls. See *id.*

<sup>271</sup> See Jayda Evans, *Enforcers a Rarity in Today's NBA*, Feb. 2, 2007, available at [http://seattletimes.nwsources.com/html/sports/2003552391\\_enforcers02.html](http://seattletimes.nwsources.com/html/sports/2003552391_enforcers02.html) (discussing rough play of NBA players who played the enforcer role on teams); see also Laura Kurz, “Where Are They Now?” - Kermit Washington, June 23, 2006, [https://www.nbrpa.com/news/wherenow/kermit\\_washington.aspx](https://www.nbrpa.com/news/wherenow/kermit_washington.aspx) (stating Kermit Washington was known as NBA enforcer).

knowing thuggish attacks masquerading as legitimate play. The law that must catch up. This is inevitable. If it was inevitable that the Geneva Conventions would develop rules governing war beyond legitimate war aims, then *a fortiori* there must be a convention to develop rules governing competitive contact sport (simulated war) beyond legitimate sports aims.

